SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 177

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, EX REL., AND FOR THE USE AND BENEFIT OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III,

Petitioners,

vs.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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GUTHRIE, PIERCE & BLAKENEY,
Of Counsel.

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Petitioners,

vs.

FARMERS BANK & TRUST COMPANY, a Corporation, and FEDERAL RESERVE BANK OF RICHMOND, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a writ of certiorari issue to review the decision of the Circuit Court of Appeals for the Fourth Circuit entered in the above entitled cause on April 11, 1944 (not yet reported below)

affirming the orders of His Honor, Johnson J. Hayes, District Judge, rendered August 26th, 1943 and September 28, 1943. This petition was filed the seventeenth day of June, 1944.

Summary Statement of the Matter Involved.

Petitioners instituted this action in the Superior Court of Richmond County, North Carolina (R. 1), and after its removal to the United States District Court, respondents moved to dismiss the action for failure of the complaint to state a claim on which relief could be granted against them (R. 9 & 10).

The following facts were alleged in the complaint: On March 14, 1939, Robert L. Steele, III, was the owner of about 2,500 acres of land in Bladen County, North Carolina, on which there were growing several million feet of valuable timber and on which there were valuable buildings, sawmills and machinery and approximately two and one-half million feet of sawed and processed lumber (R. 3). Both the land and the lumber and other property had theretofore been mortgaged to the respondents Farmers Bank & Trust Company and Federal Reserve Bank of Richmond (R. 3). On the 14th day of March, 1939, the respondents Farmers Bank & Trust Company and Federal Reserve Bank of Richmond applied to the Superior Court of Bladen County for the appointment of a receiver of the said properties of Robert L. Steele, III, and asked the Court to appoint the defendant J. R. McQueen as receiver (R. 3). The defendant McQueen was appointed receiver (R. 3). At the time of his appointment, the defendant McQueen was insolvent and the respondents knew or reasonably should have known such to be the case (R. 4). At the time of the appointment of the defendant McQueen as receiver, the respondents suggested to the Court

that the Court should fix the bond of the receiver at $10,000.00. A $10,000.00 bond was inadequate and reasonably appeared at that time to be inadequate (R. 6). The Court, because of the suggestion of the respondents, fixed the bond of the receiver at $10,000.00.

While the defendant McQueen was acting as receiver, he was in fact acting as the agent of the respondents for he acted "in conformity to the desires and directions" of respondents and "not with an impartial and independent discretion" (R. 3).

On April 21, 1939, the defendant McQueen placed a fireman in charge of the boilers whom he knew, or reasonably should have known, to be careless, incompetent and incapable of discharging the duties of a fireman (R. 4). On April 21, 1939, the defendant McQueen had allowed the doors of the furnace and fireboxes to become defective, and he knew, or reasonably should have known, that they were defective so that fire was likely to escape and become communicated to the woodshavings and other inflammable material and spread to the sawmill, buildings, machinery, lumber and other property in the vicinity (R. 4). The defendant McQueen had failed to provide efficient waterhose and firefighting equipment, and the defendant McQueen had failed to obtain and keep in effect fire-insurance on said properties (R. 5). On April 21, 1939, as a result of the negligence of the defendant McQueen and as a result of the negligence of the fireman in charge of the boilers at the Steele plant, fire escaped from the fireboxes and was communicated to the buildings, sawmill, machinery, lumber and other valuable property and did completely consume the same (R. 4).

The district court granted the motion of respondents to dismiss the action on August 26, 1943 and dismissed the action as to respondents as to any claim for relief against them (R. 10 & 11).

On the 8th day of September 1943, petitioners moved the court for leave to amend the complaint by adding to paragraph nine of the complaint a clause alleging that the failure of the defendant McQueen to insure was directly and proximately caused by wrongful interference on the part of the defendants Farmers Bank & Trust Company and Federal Reserve Bank of Richmond in the handling and management of the aforesaid receivership, in that they instructed the defendant McQueen as receiver not to obtain fire insurance covering the aforesaid properties until they, the defendant Banks, should advise him as to how and with what insurance company he could obtain fire insurance at a rate they considered to be desirable; that the defendant McQueen as receiver wrongfully complied with such instructions from the defendant Banks and failed, as stated above, to obtain any fire insurance which would have produced indemnity for the loss and destruction of the aforesaid property which thereafter occurred, as stated above, on or about April 21, 1939 (R. 11 & 12).

On September 28th, 1943, the District Court denied the motion of petitioners for leave to amend on the ground that the motion was not made within ten days of the dismissal of the case as to petitioners, and on the further ground that no new matter was alleged on which relief could be granted petitioners against respondents Farmers Bank & Trust Company and Federal Reserve Bank of Richmond (R. 13).

From the order of dismissal granted August 26, 1943 and from the order refusing petitioners leave to amend entered September 28th, 1943, petitioners appealed to the Circuit Court of Appeals for the Fourth Circuit. The case was argued in the Circuit Court of Appeals on March 14, 1944, and on April 11th, 1944, the Circuit Court of

Appeals filed an opinion affirming the action of the District Court (R. 17-23).

Jurisdiction.

By the provisions of Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925, 43 Stat. 936 (28 U. S. C. A., Sec. 347) this Court has jurisdiction to review by certiorari any case in a Circuit Court of Appeals "with the same power and authority and with like effect as if the cause had been brought * * * [here] by unrestricted writ of error or appeal." The decision of the Circuit Court of Appeals in this case was entered on the eleventh day of April, 1944, and this petition was filed on the seventeenth day of June, 1944.

Questions Presented.

1. Whether a motion to amend a complaint after the action has been dismissed for failure to state a claim on which relief can be granted is a motion for a new trial within the meaning of Rule 59 (a) of the Rules of Civil Procedure and must be served within ten days of the entry of the dismissal?

2. Whether if such motion is not a motion for a new trial within the meaning of Rule 59 (a) but is a motion under Rule 15 (a) or Rule 60 (b), the Circuit Court of Appeals is justified in conclusively presuming that the motion was denied in the discretion of the District Court when the District Court has stated that the motion was denied because it was not served within ten days and did not state a claim on which relief could be granted?

3. Whether under the North Carolina law the plaintiffs-mortgagees in a receivership action are liable to the defendant-mortgagor for losses occasioned by the malfeas-

ance or misfeasance of the receiver and his insolvency and the insufficiency of his bond?

4. Whether, where, as in this case (regardless of what the rule in North Carolina may be in ordinary receivership cases), the receiver is the *alter ego* of the plaintiffs-mortgagees and is operating under their direction and control, is insolvent and was insolvent to the knowledge of the plaintiffs-mortgagees at the time they suggested his appointment and suggested the fixing of his bond at $10,000 which then appeared to be inadequate, the plaintiffs-mortgagees are liable to the mortgagor for the losses resulting from the misfeasance or malfeasance of the receiver and the insufficiency of his bond?

5. Whether (regardless of what the rule may be in ordinary receivership cases in North Carolina) the plaintiffs-mortgagees are liable to the mortgagor, where, as in this case, the failure of the receiver to be protected by insurance was caused by the instructions and directions of the plaintiffs-mortgagees?

Reasons Relied On for Allowance of the Writ.

A. The Circuit Court of Appeals held that a motion to amend the complaint after the action was dismissed for failure to state a claim upon which relief can be granted was controlled by Rule 59 (b), Rule 15 (a), or Rule 60 (b) (R. 19). The Court of Appeals for the District of Columbia in *Safeway Stores* v. *Coe,* 78 U. S. App. D. C. ——, 136 F. 2d 771, 57 U. S. P. Q. 516, held, one judge dissenting, that a motion to vacate a judgment was a motion for a new trial within the meaning of Rule 59. The Circuit Court of Appeals for the First Circuit, with some hesitation, in *Jusino, et al.* v. *Morales & Tio,* 139 F. 2d 946, held that a motion to vacate a judgment is a motion for a new trial

under Rule 59. The Circuit Court of Appeals for the First Circuit in *United States* v. *Newberry Manufacturing Company*, 123 F. 2d 453, stated that a motion for leave to amend after an action had been dismissed for failure to state a claim on which relief can be granted is a motion under Rule 60 (b). The question as to which rule controls a motion for leave to amend after dismissal and a motion to vacate a judgment is an important question of Federal procedure about which there is much confusion in the lower Federal Courts and which has not been decided by this Court (though the decision of this court in *Leishman* v. *Associated Electric Company*, 318 U. S. 203, 63 S. Ct. 543, 87 L. ed. 714 indicates that this motion is not controlled by Rule 59).

B. The Circuit Court of Appeals in the instant case held that, if the motion to amend were controlled by Rule 15 (a) or Rule 60 (b), the District Court was properly exercising his discretion in refusing petitioners leave to amend even though the District Court held that the refusal was bottomed on the failure of petitioners to allege anything additional in the proposed amendment on which relief could be granted and because the motion was not served within ten days (R. 13). The question of whether the action of the District Court should be affirmed as a proper exercise of his discretion when he denied the motion on legal grounds is an important question of Federal procedure which has not been decided by this court. This decision is probably in conflict with decisions in which the Sixth Circuit Court of Appeals held that where a district judge denied a motion which was within his discretion for want of power or failed to exercise his discretion, the decision was reviewable.

C. In this case, the Circuit Court of Appeals for the Fourth Circuit failed to follow applicable local decisions.

1. The Supreme Court of North Carolina follows the weight of authority. *In Re Steele* (1942), 220 N. C. 685, 18 S. E. 2d 132.

(a) The weight of authority is to the effect that he who controls a third person is liable for his torts regardless of whose servant the third person is (35 Am. Jur. 970, Sec. 541); and this is in accordance with the decision of the Supreme Court of North Carolina in *Shapiro, Adm.* v. *Winston-Salem* (1938), 212 N. C. 751, 194 S. E. 479, holding the converse of this.

Furthermore, the Supreme Court of North Carolina held *in Dillon, Administratrix,* v. *City of Winston-Salem, et al.,* (1942), 221 N. C. 512, 20 S. E. 2d 845, that the person who controls a third person is liable for his torts regardless of whether or not that person is his servant.

Had the Circuit Court of Appeals followed the weight of authority (and hence followed what is presumably the North Carolina law) and the *Dillon Case,* it would have held that the plaintiffs-mortgagees were liable for the loss of the property in the hands of the receiver, for it is alleged (R. 3, 5) that he was acting under the directions and control of the mortgagees.

(b) Outside of North Carolina there are only six cases with holdings on the liability of the mortgagor and mortgagee for the loss of property while it is in the hands of a receiver appointed by a court. They are *Kaiser* v. *Keller* (1866), 21 Iowa 95; *Robinson* v. *Arkansas Loan & Trust Co.* (1905), 75 Ark. 292, 85 S. E. 413; *Sorchan* v. *Mayo* (1892), 50 N. J. Eq. 288, 23 Atl. 479; *Livingston* v. *Bauchens* (1938), 254 App. Div. 692, 3 N. Y. S. 2d 776; *Terrell* v. *Ingersoll* (1882), 78 Tenn. (10 Lea) 77, and *Downs* v. *Allen* (1882) 78 Tenn. (10 Lea) 652. Of these cases, *Terrell* v. *Ingersoll* and *Downs* v. *Allen* hold that the plaintiff is liable for all fail-

ures of the receiver to do his duty. *Sorchan* v. *Mayo* and *Livingston* v. *Bauchens* hold that the plaintiff mortgagee is liable to the mortgagor for the loss of property by the receiver; *Kaiser* v. *Keller* and *Robinson* v. *Arkansas Loan & Trust Company* hold the contrary, but both of those cases are distinguishable from this case.

Had the Circuit Court of Appeals followed the weight of authority (and hence followed what is presumably the North Carolina law) it would have held that the plaintiffs-mortgagees were liable for the loss of the property in the hands of the receiver.

(c) The Circuit Court of Appeals held that the matter alleged in the amendment petitioners proposed to make to their complaint did not state a valid claim (R. 19). In the amendment plaintiffs sought to make, they alleged that the respondents wrongfully instructed the receiver not to take out any insurance until such time as they should instruct him to do so, and that the receiver complied with these instructions and failed to take insurance that would have produced indemnity for the loss [1] (R. 11 & 12). Lord Justice Bowen in *Donovan* v. *Laing; etc. Construction Syndicate* (1893), I Q. B. (Eng.) 629, said: "* * * if the hirer [of a coach] actively interferes with the driving, and injury occurs to anyone, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of." This language was quoted with approval by Circuit Judge Taft in *Byrne* v. *Kansas City, etc. R. Co.*, 61 Fed. 605, 22 U. S. App. 220, 9 C. C. A. 666, 24 L. R. A. 693, and in *Frerker* v. *Nickolson*, 41 Colo. 12, 92 P. 224, 14 Ann. Cas. 930, 13 L. R. A. (N. S.) 1122. To like effect are *Burgess Brothers Company* v. *Stewart*, 112 Misc. 347, 184 N. Y. S.

[1] The receiver is negligent if he fail to insure. 2 Glenn, *Mortgages* 980, Sec. 188.2. See *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 237, 34 L. ed. 408, 412, 10 S. Ct. 1019.

199, affirmed 194 App. Div. 913, 185 N. Y. S. 85, and *Adams* v. *Cook*, 91 Vt. 281, 100 A. 42. Had the Circuit Court of Appeals followed the weight of authority, it would have held that the amendment stated a claim on which relief can be granted.

Furthermore, as we pointed out above (p. 6), the Supreme Court of North Carolina has held that the person who controls a third person is liable for his torts regardless of the question of agency. *Dillon, Administratrix,* v. *City of Winston-Salem, et al.,* (1942), 221 N. C. 512, 20 S. E. 2d 845. It would certainly seem, in the light of that decision, that since the very factor which caused the loss (the failure to take insurance) was directly caused by the control exercised over the receiver by the mortgagees, the mortgagees would be liable.

2. The holding of the Circuit Court of Appeals in this case was, in effect, that a receiver is conclusively presumed to be "an indifferent person between parties" (R. 21) and by sustaining the dismissal, they refused to allow petitioners to prove that the receiver in this case was the *alter ego* of the mortgagees. The Supreme Court of North Carolina looks at the reality of a situation rather than at the form.[2] Hence, had the Circuit Court of Appeals followed applicable local decisions, it would have held that petitioners had a right to prove that the receiver was in reality acting as an agent of the mortgagees and under their direction and control, as alleged in the complaint (R. 3).

3. In *Vanstory* v. *Thornton* (1883), 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483, the Supreme Court of North Caro-

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[2] *Unemployment Compensation Commission* v. *Coal Co.* (1939), 216 N. C. 6, 3 S. E. 2d 290; *Mills* v. *Mutual Building & Loan Association* (1940), 216 N. C. 664, 6 S. E. 2d 549; *Smith* v. *Greensboro Joint Stock Land Bank* (1938), 213 N. C. 343, 196 S. E. 481; *Peedin* v. *Oliver* (1943), 222 N. C. 665, 24 S. E. 2d 519.

lina held that the plaintiff in a receivership action must suffer the loss caused by the failure of the receiver appointed at his instance to pay over money in his hands. In that case, the receiver had given no bond. See in connection with this case *Thornton* v. *Lambeth*, 103 N. C. 86, 9 S. E. 432, and *Vanstory* v. *Thornton*, 110 N. C. 10, 14 S. E. 637.

For the reasons herein stated, it is respectfully submitted that the writ of certiorari prayed for should be granted.

WHITEFORD S. BLAKENEY,
By G. S. S.
GEORGE S. STEELE,
Counsel for Petitioners.

Of Counsel:
GUTHRIE, PIERCE & BLAKENEY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 177

J. M. LEDBETTER, JR., Administrator C. T. A. of the Estate of Robert L. Steele, III., and the STATE OF NORTH CAROLINA and the CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, ex rel., and for the Use and Benefit of J. M. LEDBETTER, JR., Administrator C. T. A. of the Estate of Robert L. Steele, III,

vs. *Petitioners,*

FARMERS BANK & TRUST COMPANY, a Corporation, and FEDERAL RESERVE BANK OF RICHMOND, a Corporation,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion delivered in the Court below was not officially reported and has not yet been unofficially reported.

Jurisdiction.

A final judgment was entered in the Circuit Court of Appeals for the Fourth Circuit in this case on the eleventh day of April, 1944 (R. 24). This Court has jurisdiction to

review this judgment by virtue of the provisions of Sec. 240 (a) of the Judicial Code of the United States as amended by the Act of February 13th, 1925, 43 Stat. 936 (28 U. S. C. A. Sec. 347). That section gives this Court jurisdiction to review by certiorari any case in the Circuit Court of Appeals "with the same power and authority and with like effect as if the cause had been brought * * * [here] by unrestricted writ of error or appeal."

Statement of the Case.

The case is fully stated in the Petition (pp. 1-4).

ARGUMENT.

I.

The question of which Rule of Civil Procedure applies when there is a motion to amend a complaint after the action has been dismissed for failure to state a claim on which relief can be granted is an important question of Federal Procedure which has not been decided by this Court.

The importance of this question is indicated by the fact that there is confusion in the lower federal courts as to which rule applies. In *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. —, 136 F. 2d 771, 57 U. S. P. Q. 516, the question arose in the Court of Appeals for the District of Columbia as to whether or not Rule 59 (b) applied on a motion to vacate a judgment. The Court held that Rule 59 (b) does apply, but one judge dissented. The same question arose in the Circuit Court of Appeals for the First Circuit in *Jusino* v. *Morales & Tio*, 139 F. 2d 946. The Court held that Rule 59 (b) applied, but the Court remarked (p. 948): "On a literal reading, it is not easy to bring such a motion within the rule." And later the court remarked: "Though the matter is not free from doubt, we feel constrained to follow the rulings in the

cases above cited * * *." The same Court had earlier stated that a motion to amend after an action had been dismissed for failure to state a claim on which relief can be granted is a motion under Rule 60 (b). *United States v. Newberry Manufacturing Company*, 123 F. 2d 453. And in the instant case, the Circuit Court of Appeals for the Fourth Circuit was presented with the question of whether or not Rule 59 (b) applied. The question was also raised in *Nachod & United States Signal Company, Inc. v. Automatic Signal Corp.*, 26 F. Supp. 418.

The fact that the Circuit Court of Appeals for the First Circuit stated that the matter is not free from doubt and applied one rule in a case involving a motion to vacate a judgment and another rule in a case involving a motion to amend a complaint after the action had been dismissed for failure to state a claim on which relief can be granted (which must necessarily have resulted in the vacation of the original judgment if the motion to amend had been allowed) and the fact that the Court of Appeals for the District of Columbia was divided as to which rule should apply shows that there is confusion in the lower federal courts as to which rule does apply. This matter has not been decided by this Court.

II.

The question of the reviewability of the rulings of the district judge on a motion which is ordinarily within his discretion but which he decided as a matter of law is an important question of federal procedure in which there is conflict between the decisions of the Circuit Court of Appeals for the Fourth Circuit and the Circuit Court of Appeals for the Sixth Circuit.

In the instant case, the Circuit Court of Appeals for the Fourth Circuit held (R. 19) that the ruling of the dis-

trict judge was made as a matter of discretion though the order shows (R. 13) that the ruling was made as a matter of law. Thus the Circuit Court of Appeals apparently conclusively presumed that the order was made in the exercise of the district judge's discretion.

In *Felton* v. *Spiro*, 78 F. 576, 24 C. C. A. 321, *Herman* v. *American Bridge Company*, 167 F. 930, and *City of Covington* v. *Cincinnati N. & C. Ry. Co.*, 71 F. 2d 117, the Circuit Court of Appeals for the Sixth Circuit held that where a district judge denied a motion which was within his discretion because he deemed he had no power to grant the motion, or where he failed to exercise his discretion, the decision was reviewable. This is an important question of federal procedure and should be settled by this Court for the guidance of the lower federal courts. The decisions of the Circuit Court of Appeals for the Sixth Circuit are sustained, to some degree at least, by the decision of this Court in *Mattox* v. *United States*, 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50. In so far as the decisions of the Circuit Court of Appeals for the Sixth Circuit above cited are sustained by the decision of this Court in *Mattox* v. *United States, supra*, the decision of the Circuit Court of Appeals for the Fourth Circuit in this case is contrary to that decision of this Court.

III.

The Circuit Court of Appeals failed to follow the applicable decisions of North Carolina.

1. Since the Supreme Court of North Carolina follows the weight of authority,[3] and the weight of authority is

[3] *In re Steele* (1942), 220 N. C. 685, 18 S. E. 2d 132; *Gorrell* v. *Greensboro Water Supply Co.*, 124 N. C. 238, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; *Mial* v. *Ellington*, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697, overruling *Hoke* v. *Henderson*, 15 N. C. 1, 25 Am. Dec. 677 and other North Carolina cases following it in order to follow the weight of authority. *Mial* v. *Ellington, supra*, was followed in *Brown* v. *Commissioners of Richmond* (1943), 223 N. C. 744, 28 S. E. 2d. 104.

to the effect that the one who controls a third person is liable for his torts regardless of whose servant the third person is,[4] if the Circuit Court of Appeals had followed the weight of authority in this case (and hence followed the North Carolina decisions following the weight of authority), it would have held that the mortgagees are liable to the mortgagor because they controlled the receiver.

Furthermore, in *Shapiro, Administrator,* v. *Winston Salem* (1938), 212 N. C. 751, 194 S. E. 479, the Supreme Court of North Carolina held that where the W. P. A. borrowed a servant from the City of Winston Salem and controlled him, the City of Winston Salem was not liable for the torts of the servant though the city continued to pay him and had the right to discharge him. This is in accordance with the cases cited to sustain the proposition that the weight of authority is to the effect that the person who controls the third person is liable for his torts.

And finally, the Supreme Court of North Carolina held in *Dillon, Administratrix,* v. *Winston Salem,* 221 N. C. 512, 20 S. E. 2d 845, that he who controls a third person is liable for his torts irrespective of whether or not the relationship of master and servant exists. In that case, plaintiff was held guilty of contributory negligence where he was directing the driver where to drive and the driver was negligent.

2. As was stated in the petition, of the six cases outside of North Carolina which have holdings on the liability of the mortgagor and mortgagee for the loss of property in the hands of the receiver, only two of them (*Kaiser* v. *Keller* and *Robinson* v. *Arkansas Loan & Trust Company*)

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[4] *Hartell* v. *T. H. Simpson & Son Company,* 218 N. Y. 345, 113 N. E. 255; *Denton* v. *Yazoo & M. R. Co.* (1932), 284 U. S. 305, 76 L. ed. 310, 52 S. Ct. 141; *Linstead* v. *Chesapeake & Ohio Ry. Co.* 276 U. S. 28, 48 St. Ct. 241, 72 L. ed. 453; *McInerny* v. *Delaware & H. Canal Co.* (1897), 151 N. Y. 411, 45 N. E. . . . . ; *Indiana Union Traction Co.* v. *Benadum* (1908), 42 Ind. App. 121, 83 N. E. 261.

hold that the mortgagor may not recover from the mortgagee for the loss of property in the hands of the receiver. As was stated in the petition, both of those cases are distinguishable from the instant case. *Kaiser* v. *Keller* was a case where a receiver was appointed and gave bond and the property was destroyed; then the mortgagor counterclaimed against the mortgagee for the loss of the property. The Court said: "Nor is it shown that plaintiff exercised any control over the property, or had anything to do with its management or disposition. * * *" In this case it is alleged that the receiver was under the control of the mortgagees. Furthermore, in *Kaiser* v. *Keller* it was not shown that the bond was inadequate or that the receiver was insolvent as was alleged in this case. Quite naturally the Court remarked: "His remedy is against the receiver and his bondsmen."

Likewise, in the case of *Robinson* v. *Arkansas Loan & Trust Company* there was no showing that the receiver was insolvent or the bond inadequate. Furthermore, of the six authorities relied upon by the Court in the Robinson Case, only one of them, High on Receivers, was in point, and Mr. High relied solely on the case of *Kaiser* v. *Keller*, *supra*.

The opinion in *Sorchan* v. *Mayo*, *supra*, is a well reasoned one by an able chancellor (Vice-Chancellor Pitney). The Vice-Chancellor said:

"* * * But I do not find it necessary to decide the question whether, where an indifferent person is appointed by the court upon the application of a mortgagee and becomes a defaulter, and his sureties are insufficient, the resulting loss should fall upon the mortgagee, and have referred to the authorities only for the purpose of showing that they are not all in accord with the general proposition laid down by the textwriters. It is also worthy of remark that the case of a mortgagee who applies for a receiver

stands on a footing decidedly different from that of a creditor who is suing for himself and other creditors. The mortgagee asks for the rents and profits to be applied to his mortgage, on the ground that he holds the legal title to the premises and is entitled of right to the possession and to receive the rents; and if he himself were in possession he would be entitled to hold it, and receive the rents himself, until his debts were paid; and it seems to me that it would be no hardship upon him if the rule were established that he should take the risk of the solvency of the receiver, and that a receiver so appointed should be considered the agent of the mortgagee. Such a rule would make the complainants and their solicitors applying for such appointments careful as to the character of the men whom they nominate to the court, and the responsibilities of the sureties given by the appointee * * *"

The above quotation from Vice-Chancellor Pitney is especially apt when it is considered that, as Chief Justice Clark remarked in *Gorrell* v. *Greensboro Water Supply Co.*, *supra* authorities "are to be weighed, not counted."

3. As we pointed out in the petition (p. 6) and above in this brief (p. 13), the weight of authority is to the effect that where a third person actively interferes with the manner in which a servant of another is operating his master's business, and a person is injured as a result of the interference, the third person is liable for injury resulting therefrom to the person injured. This is in accord with the decision of the Supreme Court of North Carolina in the case of *Dillon* v. *Winston-Salem*, 221 N. C. 512, 20 S. E. 2d 845. In that case it was held (221 N. C. 520) that the person under whose control the driver was operating the automobile will be deemed the master from the point of view of liability irrespective of whether or not the relationship of master and servant exists. And the person who did the

directing of the driver was held guilty of contributory negligence even though he did not direct any of the negligent acts. The amendment offered by petitioners was much stronger than the factual situation in the *Dillon Case*, for it was alleged (R. 11-12) that the mortgagees instructed the receiver not to take insurance and that as a result of those instructions, the receiver *failed* to take insurance. Thus the mortgagees participated in the wrongful act.

If the Circuit Court of Appeals had followed the weight of authority or the *Dillon Case*, it would have held that the amendment which petitioners sought to add to their complaint stated a cause of the action, for it alleged therein that the plaintiffs suffered a loss as a result of the receiver's failure to take insurance and that his failure to take insurance was the proximate result of the instructions of the mortgagees (R. 11-12).

4. The Supreme Court of North Carolina looks at the reality of the situation rather than at the form. Thus it will look through the corporate identity;[5] it will allow a mortgagor to prove that a purchase at a foreclosure sale by a third person was in reality a purchase for the mortgagee;[6] and it will construe a paper writing which is in form a deed of trust to be in reality a mortgage.[7] Hence, it would seem, had the Circuit Court of Appeals followed applicable local decisions, it would have held that the petitioners' complaint states a claim on which relief can be

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[5] *Unemployment Compensation Commission* v. *Coal Co.* (1939), 216 N. C. 6, 3 S. E. 2d 290; *Mills* v. *Mutual Building & Loan Association* (1940), 216 N. C. 664, 6 S. E. 2d 549; *Sineath* v. *Katzis* (1941), 218 N. C. 740, 756, 12 S. E. 2d. 671.

[6] *Austin* v. *Stewart* (1900), 126 N. C. 525, 36 S. E. 37; *Smith* v. *Greensboro Joint Stock Land Bank* (1938), 213 N. C. 343, 196 S. E. 481; *Council* v. *Greensboro Joint Stock Land Bank* (1938) 213 N. C. 329, 196, S. E. 483; *Mills* v. *Mutual Building & Loan Association* (1940), *supra*; *Peedin* v. *Oliver* (1943), 222 N. C. 665 24 S. E. 2d 519.

[7] *Mills* v. *Mutual Building & Loan Association, supra.*

granted and would have allowed petitioners to prove that the receiver was in reality the agent of the mortgagees.

5. The Circuit Court of Appeals failed to follow a decision of the Supreme Court of North Carolina in *Vanstory* v. *Thornton*, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483. In that case the Court said:

"And his honor correctly decided that the facts put in evidence did not prove that any payment had been made on the judgment, or that it had been satisfied in whole or in part. There was no offer to prove that plaintiff had actually received from the receiver in *Thornton* v. *Lambeth*, 103 N. C. 86, any money to be applied on this judgment, or that his failure to get it was due to his own fault or negligence. That receiver was appointed *at the instance of the defendant* to take charge of the partnership assets (*Thornton* v. *Lambeth*, 103 N. C. 86), and if, without any neglect on his part, the plaintiff failed to get what the judgment of the court in that cause directed the receiver to pay him, the loss must fall on the defendant (the plaintiff there), whose duty it was to see that the money he owed was in fact paid." (Emphasis supplied.)

Respectfully submitted:

WHITEFORD S. BLAKENEY,
By G. S. S.
GEORGE S. STEELE,
Counsel for Petitioners.

Of Counsel:
Guthrie, Pierce & Blakeney.

(10)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 177

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, ex rel., AND FOR THE USE AND BENEFIT OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, Petitioners,

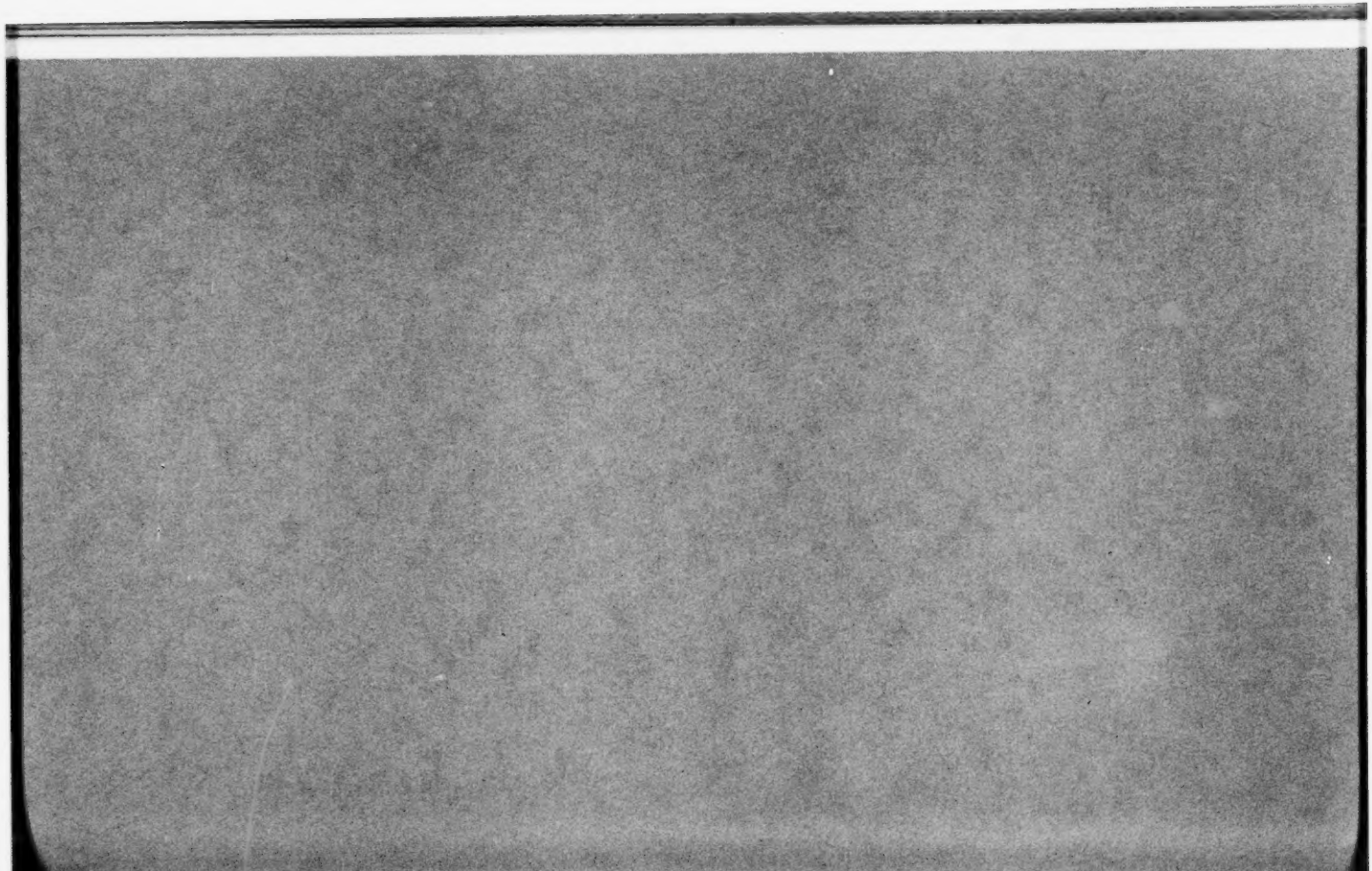
vs.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION.

Brief of Petitioners In Reply to Brief of Respondents Opposing Petition For Writ of Certiorari.

WHITEFORD S. BLAKENEY,
GEORGE S. STEELE,
Counsel for Petitioners.

GUTHRIE, PIERCE & BLAKENEY,
Of Counsel.



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vs.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION.

Brief of Petitioners In Reply to Brief of Respondents Opposing Petition For Writ of Certiorari.

I

RESPONDENTS' STATEMENT OF FACTS

On page two of their brief, respondents say that we apparently rely upon the thesis that a receiver appointed in a foreclosure proceeding is the alter ego of the party upon whose motion he is appointed. We are afraid that respondents have misapprehended our position in this matter, for (though we do not desire to waive the right to urge this Court to hold that the mortgagee should be liable for loss of property in the hands of the receiver because the receivership is for his benefit) we do not claim that the

receiver in most mortgage foreclosure actions is the alter ego of the mortgagee, but we have alleged in this case that the receiver acted according to the desires and directions of the mortgagees and not "with an impartial and independent discretion." The allegations that the receiver was acting according to the desires and the directions of the mortgagees distinguishes this case from the general case in which the receiver is an independent person between the parties. It is the direction and control of the receiver by the mortgagees which makes him in this case the alter ego of the mortgagees.

On page three of their brief, respondents object to the allegations that the receiver did not act with an "impartial and independent discretion" on the ground that these "are mere words of characteristization and color." While, perhaps, if these words stood alone, they would be objectionable, still, since they immediately follow the allegation that the receiver was acting in conformity "the desires and directions" of the mortgagees, these words serve to illustrate and illuminate the allegations as to control. Quite naturally we would not allege "any act done by the receiver which showed partiality" (respondents' brief, page 3), for an allegation of such an act would be an allegation of an evidentiary fact, while we must allege the ultimate facts to be proved. *McAllister* v. *Kuhn*, 96 U. S. 87, 24 L. ed. 615; *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 91, 23 L. ed. 898; *Fleishman Const. Co.* v. *U. S. use of Forshberg*, 270 U. S. 349, 70 L. ed. 624, 46 S. Ct. 284; *Lucas* v. *Federal Reserve Bank of Richmond*, 59 F. 2d 617; *Knight* v. *Little*, 217 N. C. 681, 9 S. E. 2d 377; *Hawkins* v. *Moss*, 222 N. C. 95, 21 S. E. 2d 873; *Lefkoff* v. *Sicro*, 189 Ga. 554, 6 S. E. 2d 687, 133 A. L. R. 738; *Mitchell* v. *Frederick*, 166 Md. 43, 170 A. 733, 92 A. L. R. 1412; *Zuniga* v. *Evans*, 87 Utah 198, 48 P. 2d 513, 101 A. L. R. 532; McIntosh, *North Carolina Practice and Procedure*, page 349; 41 *Am. Jur.* 292-293, Pleading, Secs.

7 and 8; 49 *C. J.* 40, Pleading, Sec. 16; *Id.*, 88, Pleading, Sec. 85. The ultimate fact to be proved is the control of the receiver by the mortgagee. *Dillon* v. *Winston-Salem*, 221 N. C. 512, 20 S. E. 2d 845.

II

THE APPLICATION OF THE RULES OF CIVIL PROCEDURE

We have never conceded that the motion for leave to amend was not a motion under Rule 15 as respondents indicate on page 5 of their brief. In fact, question two of the questions presented (Petition, page 5) indicates that one of the questions which we would ask this Court to decide if it granted the petition for certiorari would be whether this motion was a motion under Rule 15, Rule 59 or Rule 60. Furthermore, the Circuit Court of Appeals (R. 19) gave that as an alternative ground for its decision, if the motion is not one controlled by Rule 59. We did not go into this question more thoroughly because we did not think it proper in a petition and the brief thereon, however material it might be in a brief on the merits. In this connection, we think it worthy of remark that Rule 59 only applies to motions for a new trial, and, as was pointed out in the dissenting opinion in *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. ...., 136 F. 2d 771, 57 U. S. P. Q. 516, a new trial has been universally held to be a re-examination of an issue of fact. See 39 *Am. Jur.* 33, New Trial, Sec. 2; *Wheeling & Lake Erie Ry. Co.* v. *Ritcher*, 131 Ohio St. 433, 3 N. E. 2d 408, 410; *Garden City Feeder Co.* v. *Commissioner of Internal Revenue* (C. C. A. 8th), 75 F. 2d 804. Hence it would seem that Rule 59 could not apply to a motion to amend or vacate a judgment where there had been no trial of an issue of fact. The mere fact that the motion, if allowed, would have resulted in the vacation of the judgment does not make it a motion for a new trial under Rule 59. *Leishman* v. *Associated Electric Company*, 318 U. S. 203, 87 L. ed. 714, 63 S. Ct. 543.

III

THE FAILURE OF THE CIRCUIT COURT OF APPEALS TO FOLLOW LOCAL DECISIONS

Respondents argue that as a matter of law the mortgagees had no right to control the receiver. From that they draw the conclusion that he could not be controlled by the mortgagees. Their argument is similar to one that might be advanced that there had in fact been no murder because the defendant had no right to murder the deceased. We alleged the fact that the receiver was controlled by the mortgagees, and they countered with the proposition that the mortgagees had no right to control. We alleged facts which we think we should have been allowed to prove in order to show the reality of the situation under the doctrine of the following cases:

Unemployment Compensation Commission v. *Coal Co.* (1939) 216 N. C. 6, 3 S. E. 2d 290; *Mills* v. *Mutual Building & Loan Association* (1940), 216 N. C., 664, 6 S. E. 2d 549; *Smith* v. *Greensboro Joint Stock Land Bank* (1938), 213 N. C. 343, 196 S. E. 481; *Peedin* v. *Oliver* (1943), 222 N. C. 665, 24 S. E. 2d 519.

Furthermore, when we alleged that the receiver acted in accordance with the desires and directions of the mortgagees, we alleged no less than was proved in *Dillon* v. *Winston-Salem,* 221 N. C. 512, 20 S. E. 2d 845. In that case there was no evidence of any legal right on the part of the passenger to control the driver, but, nevertheless, the passenger was held liable for the negligence of the driver on proof that the driver was driving the automobile to the place to which he was directed by the passenger. We submit that when the Circuit Court of Appeals failed to reverse the district court, it likewise failed to follow the decision of the Supreme Court of North Carolina in *Dillon* v. *Winston-Salem, supra.*

Respondents also contend that, if there be any distinction in other jurisdictions between a receiver appointed in a mortgage foreclosure action and any other action, the distinction does not exist in North Carolina because in North Carolina the same statutes govern the appointment of mortgage receivers and other receivers. It is true that the same statutes do govern the appointment of both, but that is a matter of *procedure* and not of *substance*. And the distinction made between the two kinds of receivers is that one is acting for the benefit of the mortgagee, and the other is holding the property for the general creditors. 2 Glenn, *Mortgages,* Secs. 172.1 & 187; 2 Clark, *Receivers,* Sec. 963(a); *Sorchan* v. *Mayo,* 50 N. J. Eq. 288, 23 Atl. 479. Furthermore, even the North Carolina statutes recognize that a receivership is for the benefit of the mortgagee and is against the mortgagor, for G. S., Sec. 1-504 (Michie's Code, Sec. 862, pp. 8 and 9, of Respondents' brief) provides for a bond *"payable to the adverse party."* (Italics added.)

In this connection, *Kane* v. *Roxy Theatres* (1933), 63 F. 2d 754; *DuParquet, etc., Co.* v. *Evans* (1936), 297 U. S. 216, 56 S. Ct. 412, 89 L. ed. 591; and *N. Y. Life Insurance Co.* v. *Fulton Development Co.* (1934), 265 N. Y. 348, 193 N. E. 169 (relied upon by Mr. Glenn as supporting the proposition that the receiver represents the mortgagee alone), show that the reality of the situation is that the possession of the mortgage receiver is the possession of the mortgagee.

IV

RESPONDENTS' AUTHORITIES EXAMINED

As we pointed out in the petition and brief in support of it, pages 8 and 17-19, there are only 6 cases outside of North Carolina with holdings on the liability of a mortgagee for the loss of property in the hands of a receiver. The cases relied upon by respondents, with the exception of the two mentioned in the petition, contained nothing more

than dicta to that effect. As a matter of fact, the case of *Fountain* v. *Stickney,* 145 Iowa 167, 123 N. W. 947, 139 A. S. R., 41, had nothing to do with the matter for which it was cited. That case involved a demurrer by a receiver in a damage suit brought against the receiver by a person injured by the corporation before the receivership. The couurt upheld the demurrer without considering whether or not it would have done so had the plaintiff alleged leave of court to sue.

The Tennessee statute, Williams Code of 1934, Secs. 10.-559, does not, as contended by respondents, furnish the basis for the decisions in the Tennessee Cases. The statute provides that the "*receiver or the complainants*" shall give bond. Obviously, if the complainant did not give bond under this statute and the receiver did, the complainant would not, merely by virtue of the statute, be liable for the failure of the receiver faithfully to discharge his duties. And the cases of *Terrell* v. *Ingersoll,* 78 Tenn. 652, and *Downs* v. *Allen,* 78 Tenn. 77, make no mention of any bond whatever. But even if the complainants had given bond under the statute, they would be liable by virtue of the statute, only to the extent of the bond. Hence, the court in stating the rule in those cases must have been stating the common law rule rather than a statutory rule, for the court stated generally that "the complainant is liable for all losses occasioned by the neglect of the receiver to do his duty."

In *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 28 S. Ct. 406, 52 L. ed. 528, 13 Ann. Cas. 1155, which was a contest between the receiver and the mortgagee's trustee as to which should pay the receivership expenses, the Court seems to have been enforcing the rule that it is wrongful for the receiver to continue to operate at a loss, for it calls attention to the fact that the receiver was the only one who knew that there was likely to be a deficit. 208 U. S. at 373, 13 Ann. Cas. at 1159. See 2 Glenn, *Mortgages,* 982-983, Sec. 190.

In *Robinson* v. *Arkansas Loan & Trust Co.*, 74 Ark. 292, 85 S. W. 413, it did not appear either that the receiver was insolvent or that the bond was inadequate; and it would appear, too, that, without such a showing, the holding of the court is correct. But in any case, the authority of that case is weakened because the court failed to cite any cases upholding the other rule[1] though at that time *Sochran* v. *Mayo, supra, Downs* v. *Allen, supra,* and *Terrell* v. *Ingersoll, supra,* had all been decided, and they all contained holdings contrary to that adopted in the *Robinson Case.* (This might be an indication that the bond was sufficient, for otherwise, it would seem, the court would have cited the New Jersey and Tennessee cases.) On the other hand, only one case in the United States at that time, *Kaisar* v. *Kellar,* 21 Iowa 95, had held that the mortgagee is not liable, and the holding in that case is, as we pointed out in the petition (p. 9) and brief in suport (p. 18), distinguishable from that in this case.

Mitchell Machine and Electric Co. v. *Sabin,* 218 Ky. 289, 291 S. W. 381, relied upon by respondents, was decided on a question of jurisdiction. (Contra on that point: *Re Penny,* D. C., M. D. N. C., 10 F. Supp. 638); and in *City Savings Bank* v. *Carlon,* 91 Neb. 790, 127 N. W. 161, relied upon by respondents, the receiver was receiver of a corporation in liquidation, and plaintiff, a stranger to the receivership action, was injured by the tort of the receiver. In that case, there was neither an action on the bond, an allegation of the insolvency of the receiver nor an allegation that the receiver acted under control of the defendant.

The dictum in *O'Connell* v. *St. Louis Joint Stock Land Bank,* 170 Ark. 778, 281 S. W. 385, is explained by the doctrine of stare decisis since it relied upon the *Robinson Case, supra.*

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[1] *Carr* v. *Eel River & Eureka R. Co.,* 93 Cal. 366, 33P. 213, 21 L. R. A. 354, 365.

State v. *Whitehurst*, 212 N. C. 300, 193 S. E. 657, 113 A. L. R. 740, is relied upon by respondents for the proposition that the receiver is a hand or arm of the court (a proposition that we do not deny). The language of the court is interesting (212 N. C. at 303):

"Thus it will be seen that, by repeated amendments, the scope of the statute has been gradually enlarged and its base progressively broadened. But at no time has it been made applicable, *ipsissimis verbis*, to receivers of insolvent corporations. Nor does it appear, under the rule of strict construction (25 R. C. L., 1076) that the statute is susceptible of the interpretation inclusive of such receivers.

"By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed (*S.* v. *Earnhardt*, 170 N. C., 725, 86 S. E., 960), but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. *U. S.* v. *Wiltberger*, 5 Wheat., 76. *Criminal statutes are not to be extended by implication or equitable construction to include those not within their terms*, for the very obvious reason that the power of punishment is vested in the legislative and not the judicial department. It is the General Assembly which is to define and ordain their punishment. *Jennings* v. *Commonwealth*, 109 Va., 821, 63 S. E., 1080, 132 A. S. R., 946, 17 Ann. Cas. 64, 21 L. R. A. (N. S.), 265. Compare *S.* v. *Humphries*, 210 N. C., 406, 186 S. E. 473, and *S.* v. *Bell*, 184 N. C., 701, 115 S. E. 190." (Emphasis supplied.)

And later, p. 303: ". . . He is not an agent within the meaning of the embezzlement statute. *S.* v. *Hubbard*, 58 Kan., 797, 51 Pac., 290, 39 L. R. A., 860. . . ."

Respondents seek to minimize the authority of *Sorchan* v. *Mayo*, 50 N. J. Eq. 288, 23 Atl. 479, on the grounds that it was rendered by a one-man court, it has never been cited

but once,[2] it is cited by the text-writers as a minority holding, and the opinion itself acknowledges that it is at variance "with all the then extant American authority." (Respondents' brief, pp. 17-19.) Though *Vice Chancellor Pitney* may have been sitting by himself when he delivered that opinion and though it has never been cited but once, the opinion does not acknowledge that it is at variance "with all the then extant American authority." Nor is it, when it is referred to in textbooks, always mentioned in footnotes as "an exceptional case." (Respondents' brief, p. 18.) In 3 Jones, *Mortgages* (7th ed.), Sec. 1537a (3 Jones, *Mortgages*—8th ed.—Sec. 1954), it is said:

"Whether a mortgagee who nominates and secures the appointment of a receiver is responsible for his default is a question upon which there is a *conflict of authority.* On the ground that the receiver is appointed for and on behalf of all persons interested, it is contended that any loss arising from the default of the receiver must be borne, as between the parties, by the estate in his hands.[3] (2 Daniell, Ch. Pr., pp. 740; 2 Maddock, Ch. Pr., p. 255; Kerr, Receivers, p. 64 These authorities all rely upon the single case of *Hutchinson*

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[2] The fact that a case has never been cited does not detract from its effect as authority. *Ray* v. *Denver,* 109, Colo. 74, 121 P. 2nd 886, 138 A. L. R. 1485.

[3] It would seem that, as a matter of logic, if the receiver is appointed for the benefit of all parties, then the loss should be suffered by all and not merely by the mortgagor, which is the result if the loss fall on the estate, for the debt is still subsisting. Furthermore, in a mortgage receivership, the receiver is appointed for the benefit of the mortgagee. (*Sorchan* v. *Mayo, supra; Kane* v. *Roxy Theatres, supra;* 2 Glenn, *Mortgages,* Secs. 172.1 & 187), and if the loss is to fall upon him for whose benefit the receiver is appointed as suggested by those authorities, it should fall upon the mortgagee. (N. B. Mr. Jones' footnotes have been put in the body of the brief in parentheses.)

v. *Masserene*, 2 Ball. & B. 55,[4] except that Mr. Maddock cites in addition the case of *Rigge* v. *Bowater*, 3 Brown Ch. 365. The American Treatises follow the English. High, Receivers, sec. 270; Beach on Receivers, sec. 303.) In a recent case in Arkansas, it was held that the mortgagee, at whose instance the receiver was appointed, could not be held liable in case such receiver embezzled or otherwise wasted the rents and profits. (*Robinson* v. *Arkansas Loan & Co.*, 74 Ark. 292, 85 S. W. 413.) But on the other hand, in a comparatively recent case in New Jersey, the vice chancellor held that in such case the mortgagee must bear any loss caused by the defalcation of the receiver so appointed, and the insufficiency of his sureties. (*Sorchan* v. *Mayo*, 40 N. J. Eq. 288, 23 Atl. 479.) *The vice chancellor reviews and comments upon the authorities, and concludes that they do not support the contention that the mortgagee is not responsible.*" (Emphasis supplied.)

An examination of the case of *Sorchan* v. *Mayo* will show that, as Mr. Jones remarks, he did examine and comment on the authorities and concluded that they did not support the contention that the mortgagee is not liable.

It is no small wonder that *Sorchan* v. *Mayo* has not been cited more often than it has, for since that decision, so far as counsel for petitioners have been able to discover, there have been only two reported cases dealing with the question,[5] the Arkansas case and *Livingston* v. *Bauchens*, 254 App. Div. 692, 3 N. Y. S. 2d 776. Of these, the Arkansas case did not cite the New Jersey case, but the New York case followed it.

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[4] As pointed out by Vice Chancellor Pitney in *Sorchan* v. *Mayo*, the case of *Hutchinson* v. *Lord Masserene*, 2 Ball. & B. 55 does not support the contention of the text-writers.

[5] The paucity of authority on this question is probably due to the fact that usually an adeqate bond is given and the receiver insures.

The note on the instant case in 30 *Va. Law Rev.* 498, cited by respondents, loses much of its force when it is considered how many erroneous assumptions appear in it. 1. The note assumes that this action was instituted in the Federal District Court. Nothing in the opinion would suggest that it was not a case which had been removed, and the record shows that the complaint was prepared for the Superior Court of Richmond County, North Carolina (R. 1), and it affirmatively appears from the stipulation included in the typewritten manuscript record (p. 14), that this action was instituted in the Superior Court of Richmond County and was removed to the Federal District Court on motion of the Federal Reserve Bank of Richmond. 2. The note assumes that jurisdiction was obtained because of diversity of citizenship. Federal jurisdiction was, in fact, obtained because the Federal Reserve Bank of Richmond is a party (Manuscript record, p. 14). 48 Stat. 184, 12 U. S. C. A., Sec. 632; see *American Bank & Trust Co. et al.* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350, 356-7, 65 L. ed. 983, 989, 41 S. Ct. 499. 3. The note assumes that the mortgages on the property in question were separately owned, one by the Farmers Bank & Trust Co., and the other by the Federal Reserve Bank of Richmond. There is nothing in the opinion in the court below to support such a view, and the record only shows one mortgage. (R. 3.) It thus seems clear that this Law Review note is hardly to be given any weight as authority.

V

RESPONDENTS' CONTENTIONS ANALYZED

The contentions of respondents may be summarized thus:

"The receiver is an officer of the court; therefore, the mortgagees may not be held liable for his negligence and the insufficiency of his sureties." This premise is itself a conclusion resulting from two other premises: "1. An officer of

the court cannot be the agent of the mortgagees. 2. The mortgagees can be held liable for the negligence of the receiver only on the ground that the receiver is their agent." It is with these last two premises that we disagree, for we have never contended that a receiver is not an officer of the court. We will discuss them separately.

In the first place, in the collusion cases (Re *Penny*, 10 F. Supp. 638, and cases cited in annotations at 84 A. L. R. 1463 & 90 A. L. R. 406), it is said that "receivers will be *regarded* as agents of the parties rather than as officers of the court." 45 *Am. Jur.* 109, Receivers, Sec. 129. (Emphasis supplied.) The statement is not that they cease to be officers of the court but that they will be "regarded" as agents rather than as officers. It would seem that the language would indicate that they do not cease to be officers of the court but that for the purpose of liability are treated as agents. Whether receivers in cases of collusion *are treated* as agents, or *are* agents, it would seem that there would be no reason why the receiver, in a case such as this, should not be regarded as the agent of the mortgagees since he operated under their direction and control. So, also, a court of equity might very well look through the receivership entity, as it will through the corporate entity, though as a matter of strict law (such as respondents would have applied in this case), the agent of the corporation could not be the agent of the parent corporation, for, in law, they are separate entities.

The second premise is more involved. As we pointed out in our first brief (p. 17), where one person controls a third person, he is liable for his torts regardless of whether or not the master-servant or principal-agent relationship exists. Thus, in a number of cases, a person has been held liable for the torts of a third person even though the third person was not his servant. See, for example, *Dillon* v. *Winston-Salem, supra*. The mortgagee could likewise be held liable on the ground that the receiver is appointed for his benefit,

even though the receiver is not his agent. The benefit test is suggested by all the textwriters, according to Mr. Jones,[6] though they seem to misapply it.

VI

THE QUESTION OF INSURANCE

We do not contend that the mortgagees had any duty to insure, but we do contend that they had no right to prevent the receiver from insuring. Their act in so doing amounted to an independent tort. See pp. 9-10 of our petition in this case. We did not rely on *Thompson* v. *Phenix Insurance Company*, 136 U. S. 287, 34 L. ed. 408, 10 S. Ct. 1019, as holding that "a receiver is always bound to effect insurance on property in his possession," as respondents state on page 19 of their brief. In footnote 1, page 9, of the petition, we said: "See *Thompson* v. *Phenix Insurance Company* . . . ," intending to indicate a statement or dictum to that effect. See *A Uniform System of Citation* (Cambridge, Massachusetts, 1936, Harvard Law Review Association), p. 3.

It is well known that a receivership is a harsh remedy. *Martin* v. *Jonas*, 210 N. C. 665, 188 S. E. 81; *Neighbors* v. *Evans*, 210 N. C. 550, 554, 187 S. E. 796. One of the harsh things about it is that it takes a man's property out of his control so that it is beyond his power to protect it, and yet, at the same time, because his property has been taken away from him, he is deprived of the pecuniary ability to protect it with insurance.

All the matters of omission with which respondents charge Robert L. Steele, III, in their brief are at best matters of contributory negligence, which, under Rule 8(c) of the Rules of Civil Procedure, must be raised by answer.

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[6] 3 Jones, *Mortgages* (7th ed.), *Sec.* 1537a; 3 Jones, *Mortgages* (8th ed.), Sec. 1954.

VII

CONCLUSION

Since the appointment of a receiver is a harsh remedy (*Martin* v. *Jonas, supra; Neighbors* v. *Evans, supra*), for the benefit of the mortgagee (*Kane* v. *Roxy Theatres, supra; Sorchan* v. *Mayo, supra;* 2 Glenn, *Mortgages,* Sec. 172.1; 2 Clark, *Receivers,* Sec. 963a), it would seem only just and equitable that the mortgagee who has sought this harsh remedy for his benefit should "take the risk of the solvency of the receiver" [7] and the sufficiency of his bond.

This case presents an important question as to the application of the Rules of Civil Procedure which has not been decided by this Court and about which there is confusion in the lower federal courts. Furthermore, the Circuit Court of Appeals failed to follow the applicable North Carolina decisions holding that a person who controls another is liable for his torts and that North Carolina will follow the weight of authority; for the weight of authority as hereinabove shown, is to the effect that the mortgagee must suffer the loss occasioned by the negligence of the receiver. The Circuit Court of Appeals likewise failed to follow the decision of the Supreme Court of North Carolina in *Vanstory* v. *Thornton,* 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483, which holds that a person at whose instance a receiver is appointed must suffer the loss occasioned by his malfeasance.

Respectfully submitted,

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GEORGE S. STEELE,
Counsel for Petitioners.

Of counsel:

GUTHRIE, PIERCE & BLAKENEY.

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[7] *Sorchan* v. *Mayo, supra.*

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 177.

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, *EX REL*, AND FOR THE USE AND BENEFIT OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, PETITIONERS,

versus

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

M. G. WALLACE,
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Supreme Court of the United States

No. 177.

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, *EX REL,* AND FOR THE USE AND BENEFIT OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, PETITIONERS,

versus

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

SUPPLEMENTAL STATEMENT OF FACTS.

Since the petition was filed in this case, the opinion of the Circuit Court of Appeals has been published, and appears in 142 Fed. (2d) page 147.

The basic thesis upon which petitioners rely appears to be that a receiver appointed in a proceeding to foreclose a mortgage is the alter ego of the party upon whose motion he is appointed so that it is incumbent upon such party to see to it that a proper person is selected as receiver; that a sufficient bond is given and that the receiver manages the property in a prudent and proper manner. Our contention is that in North Carolina a receiver is appointed only when a court, in the exercise of its discretion deems it proper. The Receiver is, therefore, under the control of the court, not of the parties, so that no party is responsible for his acts, although any party may confer with him or make known to him the wishes and desires of the party with respect to the management of the property in his possession.

The statement of facts in the petition for *certiorari* giving the substance of the allegations of the complaint is correct in so far as it goes, but there are certain additional points concerning the allegations of the complaint, or more accurately the absence of allegations from the complaint, which we deem significant.

The complaint in the action does not deny that the Superior Court of Bladen County had jurisdiction of the parties and of the subject matter, and does not deny that the court proceeded according to the law of North Carolina, which gives to the court the right to determine whether or not any receiver shall be appointed, and affords to the defendant an opportunity to be heard as to the appointment of the receiver, the qualifications of the receiver, the amount of bond to be given and the instructions to be given to the receiver. The complaint does not allege that there was any fraud or concealment practiced upon the court. In the absence of any such allegations, the plaintiff must be deemed to have admitted that Robert L. Steele, III, had a full opportunity to be heard as to the propriety of appointing a receiver, the qualifications of the person to be appointed, the amount of bond to be required and the in-

structions to be given, and that Robert L. Steele, III, did not see fit to avail himself of such opportunity.

There is no allegation that the suit in Bladen County, North Carolina, in which the receiver was appointed, has been dismissed, or that the order appointing the receiver has been reversed, modified or vacated. Indeed, it affirmatively appears from the complaint that three and one-half years after the appointment of the receiver he was still acting. (Complaint paragraph 14, Record, p. 7.) It must, therefore, be deemed admitted that the order appointing the receiver, fixing the amount of his bond and giving him instructions, remains in full force and effect.

While it is stated in the complaint that the receiver did not act with an "impartial and independent discretion", (Complaint paragraph 8, Record, p. 3) these are mere words of characterization and color. There is no allegation of any act done by the receiver which showed partiality, for obviously the alleged negligent operation of the sawmill and the failure to effect insurance were not, and could not have been, particularly beneficial to the mortgagee. There is no allegation in the complaint that the receiver did anything contrary to the express directions of the order of the court appointing him, and there is no allegation that he was directed by the court to take out insurance.

There is no allegation of any act done by the banks tending to coerce, intimidate or mislead the receiver, and no suggestion of any means whereby the banks could exercise control over a receiver appointed by the court. The allegation in the complaint, taken as amended, concerning the wrongful interference with the receiver by the banks (Record, p. 12), is no more than a conclusion of the pleader, for the specific allegation that the banks instructed the receiver not to effect insurance cannot be construed as meaning more than that the banks made known their wishes in this respect to the receiver, since there is no allegation as to anything done by the banks to coerce or compel the receiver to comply.

In respect to the motion to amend, the complaint shows

that a prior action for the same cause of action was instituted by the plaintiff against the defendants on April 25, 1942, and was dismissed on motion of the plaintiff on September 8, 1942 (Complaint paragraph 14, Record, p. 6). The complaint in the instant action was verified July 3, 1943 (Record, p. 7). The order dismissing the complaint in this action was entered at a hearing on August 26, 1943 (Record, p. 11), at which plaintiff was represented by two counsel. When the judgment was entered plaintiff apparently made no request for leave to amend. The motion of September 8, 1943, was described as a motion to amend the complaint (Record, p. 11) and was accompanied by no showing of mistake, inadvertence, surprise or excusable neglect in connection with the judgment entered on August 26th.

The amendment, if made, would have done no more than change the emphasis in the allegations of the complaint, for the original complaint alleged that the receiver acted in conformity to the desires and directions of the defendants (Complaint paragraph 8, Record, p. 3), and that he failed to obtain and keep in effect fire insurance (Complaint paragraph 9, Record, p. 5). The complaint if amended would only have changed this language so as to state that the receiver failed to effect insurance on the property and that the banks requested or directed him not to do so.

II.

ANSWER TO POINTS I AND II OF BREIF FOR PETITIONERS.

(Petitioners' Brief, pp. 14-16).

Since both points I and II in the brief for the petitioners deal with the construction of the Rules of Civil Procedure, we believe it will be advisable to discuss these points as one.

As we stated, the motion of September 8th was presented to the trial court as a motion to amend a pleading

in a pending case, apparently invoking the discretionary power given to the court by Rule 15. That rule apparently deals only with amendments before judgment, for it refers to no amendments after judgment except formal amendments designed to conform pleadings to proof which do not affect the judgment (Rule 15(b)). The rule certainly does not appear to have been designed to allow a litigant to reopen for further litigation any matter of fact or of law once decided. Obviously, therefore, the motion could not have been acted on as one to amend a pleading, but in order to have entertained it, the court would have been obliged to have treated it as an application to vacate a final judgment. Petitioners now appear to concede this, and contend that the motion should have been regarded as one made under Rule 59 or Rule 60(b).

Rule 59 allows a judgment in an action tried without a jury to be reopened only for the reasons for which before the adoption of the Rules of Civil Procedure rehearings were granted in suits in equity in courts of the United States. We have found no case suggesting that the desire of a party to amend his pleadings was ever regarded as a reason for allowing a rehearing in a suit in equity. In any event, a motion under this Rule, not based on newly discovered evidence, must be made within ten days after the entry of judgment. Rule 59, therefore, can have no application.

Rule 60(b) is limited to cases in which the judgment, order or proceeding was taken through mistake, inadvertence, surprise or excusable neglect. A motion under this rule, supported by proper showing, is of necessity addressed to the sound discretion of the trial court, but we submit that it would be an abuse of discretion for the trial court to presume the existence of facts showing mistake, inadvertence, surprise or excusable neglect in the absence of even a suggestion from the complaining party that such facts existed. We submit, therefore, that the court could not, under Rule 60(b), have properly granted the motion as made.

We suggest that the references of the Circuit Court of Appeals to the discretion of the trial court were directed to the fact that, had the Trial Judge been of the opinion that substantial justice required it, he could have made inquiry as to the possible existence of "inadvertence", or "excusable neglect", which caused the plaintiff to fail in two attempts to state his case in the manner in which he desired to state it. Certainly the trial court was not required to initiate such an inquiry when the plaintiff made no offer to explain the reason for the neglect.

It is clear, however, that both of the lower courts were convinced that the allowance of the amendment was not necessary to attain substantial justice because the facts stated in the complaint as amended were not essentially different from those stated in the complaint before amendment (Record, pp. 13, 19, 22, and 142 Fed. (2d) 149-150). We will, therefore, follow the lead of the lower courts and consider the plaintiffs cause of action as if the amendment had been allowed.

III.

ANSWERS TO POINT III OF BRIEF OF PETITIONERS.

(Petitioner's Brief, pp. 16-21).

A.

Statutes of North Carolina Concerning the Appointment of Receivers and Their Powers.

Petitioners appear to concede that the question as to whether the complaint states facts upon which relief can be granted depends entirely upon the application of the law of North Carolina. We, of course, concur in this view. While the law of North Carolina upon the subject of the appointment of receivers and their powers and duties is generally similar to the rules applied in almost all states,

in North Carolina these subjects are to a large extent regulated by statutes. For the convenience of the court we quote at length certain sections of Michie's Code of North Carolina for 1939 which we consider pertinent to the case.

Michie's Code of North Carolina, 1939:[1]

"Sec. 848. *Not issued for longer than twenty days without notice.*—No restraining order, or order to stay proceedings, for a longer time than twenty days shall be granted by a judge out of court, except upon due notice to the adverse party; but the order shall continue and remain in force until vacated after notice, to be fixed by the court of not less than two nor more than ten days."

"Sec. 851. *What judges have jurisdiction.*—The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order."

"Sec. 856. *Issued without notice; application to vacate.*—If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer. If no such appli-

[1]The Sections of Michie's Code of North Carolina, 1939, quoted below, now appear as Sections 1-490, 1-493, 1-498, 1-501, 1-502, 1-504; and 55-148 General Statutes of North Carolina, 1943.

cation is made, the injunction continues in force until such application is made and determined by the judge, and a verified answer has the effect only of an affidavit."

"Sec. 859. *What judge appoints.*—Any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions."

"Sec. 860. In what cases appointed.—A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgments upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations in the article Receiver; and in like cases, of the property within this state of foreign corporations.

The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be to receivers appointed hereunder."

"Sec. 862. *Receiver's bond.*—A receiver appointed in an action or special proceeding must, before enter-

ing upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver." (Section 339 permits the acceptance of a surety company instead of the two sureties mentioned.)

"Sec. 1209. *Powers and bond*.—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights and interest.

5. Appoint agents under him.

6. Examine persons and papers, and pass on claims as elsewhere provided in this article.

7. Do all other acts which might be done by

> the corporation, if in being, that are necessary for the final settlement of its unfinished business.
>
> The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes."

Petitioners appear to lay some stress upon the point that in some jurisdictions the powers and duties of a receiver appointed in a suit to foreclose a mortgage differ from those of a receiver appointed in other cases. It is obvious from a reading of the statutes of North Carolina that such a distinction is unknown in that state. Section 860 makes applicable to all receivers the sections of the Chapter of the Code of North Carolina entitled "Corporation dealing with Receiverships". Section 1209 is a part of that chapter and so defines the powers of all receivers.

It has frequently been held in North Carolina that a motion for the appointment of a receiver, whether in a suit to foreclose a mortgage or in any other type of suit, is addressed to the sound discretion of the court, and that no party may, as a matter of right, demand that a receiver be appointed (*Whitehead* v. *Hale*, (Sup. Ct. N. C. 3-31-96), 118 N. C. 601, 24 S. E. 360), so obviously no party can require the court to appoint a particular person as receiver.

Under the plain terms of Sections 862 and 1209 only the court can determine the amount of the bond to be given by a receiver, and it is established that even if the court fails to require any bond, the order appointing the receiver is valid, until modified, vacated or reversed. *Nesbitt and Bro.* v. *Turrentine*, (Sup. Ct. of N. C., June, 1880), 83 N. C. 536. Such an order is an adjudication binding on the parties, and not subject to collateral assault.

In *Rousseau* v. *Call* (Sup. Ct. N. C. 5-25-15), 169 N. C. 173, 85 S. E. 414, at page 416, the Supreme Court of North Carolina said:

> "And the court, in the exercise of its jurisdiction, having entered judgment appointing plaintiff receiver, its judgment is not open to collateral attack, and, if the order was improvidently made, its propriety is not open to question on this suit."

The plain terms of Section 1209 quoted above, show that a receiver in North Carolina holds the property in his custody subject to the direction of the court, hence he cannot be the agent or servant of a party to the litigation, for the parties cannot control him, and it appears from cases cited by counsel for petitioners, as well as from many other cases, that in North Carolina, as in almost all jurisdictions, the power to control is the essential element in the relation of master and servant or that of principal and agent.

B.

North Carolina Decisions Holding That a Receiver is Controlled by the Court—Not the Litigants.

The Supreme Court of North Carolina has frequently had occasion to declare that a receiver is a representative, officer, or "hand" of the court which appointed him.

Simmons v. *Allison* (Sup. Ct. of N. C., 5-19-96), 118 N. C. 761, 24 S. E. 740, at page 740, the Court said:

> "The custody of the receiver is the custody of the law, and the judge had power to instruct the receiver as to the exercise of his duties. He was under the supervision and control of the court."

State v. *Norfolk and Southern R. R. Co.* (Sup. Ct. of N. C. 2-25-10), 152 N. C. 785, 67 S. E. 42, 26 L. R. A. (N. S.) 710, 21 Anno. Cases 692. In this case it was held that a corporation may not be prosecuted on account of the acts of the receiver who was in charge of the property of the corporation. At 67 S. E., page 44, the Court said:

> "A receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite,* the fund or property in litigation, when it does not seem equitable to the court that either of the litigants should have possession of it. He holds the property for the benefit of all the parties interested. His title and possession is that of the court, and any attempt to disturb his possession or to interfere when he is acting under the authority and orders of the court is contempt, and punishable accordingly."

Gobbel v. *Orrell* (Sup. Ct. of N. C. 11-12-03), 163 N. C. 489, 79 S. E. 957, at page 959, the Court said:

> "The receiver's possession is that of the court taken for the purpose of securing the thing in controversy, so that it may be subject to such disposition as it may finally direct."

See also:

State v. *Whitehurst* (Sup. Ct. of N. C. 11-3-37), 212 N. C. 300, 193 S. E. 657, 137 A. L. R. 740.

Blades v. *Hood* (Sup. Ct. of N. C. 6-15-32), 203 N. C. 56, 164 S. E. 828.

Corporation Commission v. *United Commercial Bank* (Sup. Ct. of N. C. 9-24-41), 220 N. C. 48, 16 S. E. (2nd) 473.

Counsel for petitioners cite and rely upon *Vanstory* v. *Thornton* (Sup. Ct. of N. C. 5-5-93), 112 N. C. 196, 17 S. E. 566. We think that an examination of the opinion in this case, particularly the portion quoted by counsel for petitioners, will show that the court held that the default of the receiver did not alter the rights of the parties among themselves. The fact that the receiver had been appointed at the instance of the party on whom the loss primarily fell was immaterial. Such a loss falls upon the parties as their interest may appear. In the instant case the loss occasioned by destruction of the mortgaged property will

fall on the mortgagee, unless other property subject to the mortgage is found sufficient to pay the mortgaged debt, or the estate of the mortgagor is solvent. There is no allegation of either of these facts.

C.

AUTHORITIES FROM OTHER STATES HOLDING THAT A RECEIVER IS NOT THE AGENT OF THE LITIGANTS.

While we believe that an examination of the statutes of the State of North Carolina and the decisions of its court of last resort are themselves sufficient to show the correctness of the decisions of the courts below, we think that the rules applied in North Carolina are, as we have stated, substantially similar to those applied in most jurisdictions, and that therefore the court of North Carolina would regard the prevailing weight of decisions from other jurisdictions and statements found in standard texts as persuasive. As petitioners pointed out in their brief, cases dealing specifically with the question as to whether a party upon whose motion a receiver is appointed is liable for the acts of a receiver are not numerous. The explanation of this appears to be that few litigants have ever advanced such a theory. The basic idea underlying the conception of the nature of a receiver's office is that the receiver is appointed by and responsible to the court, and therefore independent of the parties, so that, indeed, any attempt by any party to interfere with him is contempt of court. As Judge Dobie pointed out, a different concept would frustrate the entire purpose of receiverships, which is to divest all contending parties of the bone of contention and bring it within the impartial control of the court itself.

We refer to the following cases as holding that the party on whose motion a receiver is appointed is not responsible for the receiver's acts.

Atlantic Trust Co. v. *Chapman* (U. S. Sup. Ct. 2-24-08), 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas.

1155. This case holds that the party upon whose motion a receiver is appointed is not responsible for the expenses of the receiver if the fund is insufficient to pay all such expenses. The receiver was appointed on motion of the trustee in a mortgage deed of trust in a suit for foreclosure. The court said, at 208 U. S. 370:

> "We are of opinion that the Court of Appeals erred in holding that the Trust Company (the mortgage trustee) was liable for the deficiency found to exist. No such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation. The motion for a receiver was to the end that the property might be cared for and preserved for all who had or might have an interest in the proceeds of its sale. The circumstances seemed to have justified the motion, but whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver."

In *O'Connell* v. *St. Louis Joint Stock Land Bank* (Sup. Ct. Ark. 3-22-26), 170 Ark. 778, 281 S. W. 385, at page 387, the Court said:

> "The receiver was therefore legally appointed and appellee was not responsible for his conduct in the management and operation of the impounded property. If there were any just complaints against the action of the receiver, the remedy was solely against him and the sureties on his bond."

Robinson v. *Arkansas Loan & Trust Co.* (Sup. Ct. of Ark. 2-18-05), 74 Ark. 292, 85 S. W. 413. In this case Arkansas Loan and Trust Co. brought a suit to foreclose a mortgage given by one Robinson. A receiver was appointed to collect the rents and profits. The receiver embezzled the money collected. The Court said (at 85 S. W. 415):

"He (receiver) was not the agent of either party but an officer of the court, and subject to its control. He and the sureties on his bond are alone responsible for his wrong doing."

Mitchell Machine and Electric Co. v. *Sabin* (Sup. Ct. of Ky. 2-15-27), 218 Ky. 289, 291 S. W. 381. This was a suit brought by one creditor against another. It was alleged that the second creditor had united with a debtor in asking for the appointment of a receiver of the debtor's estate and that this action was collusive. It was alleged that the receiver had mismanaged the estate, and it was sought to hold liable the creditor who had joined in the motion for the appointment of a receiver.

The court held that, since the receiver was appointed by a court of competent jurisdiction, the order appointing him could not be assailed in another court, and said (at 291 S. W., p. 382):

"Though a receiver appointed by the court acts as receiver for all parties interested, he is not the agent of the parties in the sense that each of them is responsible for his acts. *City Savings Bank* v. *Carlon*, 87 Neb. 266, 127 N. W. 161. Therefore, if the receiver did mismanage the affairs of the corporation, the Bank of Smithland was no more responsible for his action than appellant, who is also a party to the proceeding."

City Savings Bank v. *Carlon* (Sup. Ct. of Neb. 6-10-10), 91 Neb. 790, 127 N. W. 161, at page 163, the Court said:

"Of course, a receiver appointed by the court in the progress of litigation acts as receiver for all parties to the litigation and may be said in some sense to that extent to be the agent of all parties, but he is not the agent in the sense that the parties to a litigation have employed him and can control his actions. He is the arm of the court and the parties to the litigation are not necessarily responsible for the wrongs which he may commit as receiver."

Kaiser v. *Keller* (Sup. Ct. of Iowa, 6-28-66), 21 Iowa 95.

Fountain v. *Stickney* (Sup. Ct. of Iowa, 12-18-09), 145 Iowa 167, 123 N. W. 947, 139 A. S. R. 41.

Statements in standard texts to the effect that the parties have no right to control the receiver, so that he cannot be the agent or servant of the parties, are numerous, although the statement is usually made as if it were an elementary proposition and is seldom elaborated. Among the texts containing such statements are:

Restatement of the Law—Agency—Section 14, Volume 1, page 47;

Ruling Case Law—Receivers—Section 2, Volume 23, page 7;

Corpus Juris—Receivers—Section 84, Volume 53, page 73;

High on Receivers, 4th Edition, Section 1, page 2;

Hilgh on Receivers, 4th Edition, Section 270, page 319;

Clark on Receivers, 2nd Edition, Section 38, Volume 1, page 36.

In a note published in the Virginia Law Review for June the decision of the Circuit Court of Appeals has been commended as sound (Virginia Law Review, Vol. 30, No. 3, p. 498).

We submit that the statutes of North Carolina and the decisions of its court of last resort show that in that state the decision to appoint a receiver can be made only by the court; that the person to be appointed can be selected only by the court; that the amount of the bond to be given can be determined only by the court; and that only the court can control or instruct a receiver. It follows, therefore, that a receiver can never be the agent or servant of the party on whose motion the receiver is appointed, and that such party is in no way responsible for the acts of the receiver. We further submit that on these points the law of North Carolina is in accord with the law in almost all other states.

D.

PETITIONERS' AUTHORITIES EXAMINED AND CRITICISED.

Counsel for petitioners' appear to rest their case entirely on the contention that the Supreme Court of North Carolina could be expected to follow a rule at variance with the one followed in the decisions mentioned above and stated as elementary in the texts cited. The rule which petitioners state as the prevailing rule appears to find no support except in *Sorchan* v. *Mayo* (Ct. of Chancery of N. J., 1-9-92), 50 N. J. Eq. 288, 23 Atl. 479, and the Tennessee cases mentioned in the brief of the petitioners. The facts in *Sorchan* v. *Mayo* were peculiar. The receiver before appointment was the agent of the mortgagee and the fact seems either to have been concealed from or at least not disclosed to the court. There is no allegation of any such facts in this case. The decision in *Sorchan* v. *Mayo* was by a single judge, who, in the course of his opinion, concedes that the views which he expresses are at variance with the then extant American authority, and he contends that the generally accepted rule is based upon a misconception of certain early English authorities. The reasoning of the judge in *Sorchan* v. *Mayo* seems to have attracted little attention from other courts. In the fifty years which have elapsed since the case was decided, it has never been cited by any other court except in *Livingston* v. *Bauchens* (Supreme Court of New York Appellate Division, 4-18-38), 254 App. Div. 692, 3 N. Y. S. (2d) 776. In this case there is a mere reference to the New Jersey case without comment or discussion, so it is impossible to tell from the opinion to what effect the New Jersey case is cited. The court of last resort of New Jersey appears to hold a view concerning the office of a receiver inconsistent with the decision in *Sorchan* v. *Mayo*. In *Mortgage Security Corporation* v. *Townsend* (Ct. of Errors and Appeals of New Jersey, 5-18-31), 108 N. J. Equity 264, 154 Atl. 827, at page 828, it is said: "A receiver stands as a representative of

the court impartially between the parties". When *Sorchan* v. *Mayo* is referred to in encyclopedias and texts, it is referred to in footnotes apparently as an exceptional case.

The Judge in *Sorchan* v. *Mayo* cites no American authority as sustaining his position except the Tennessee case of *Terrell* v. *Ingersoll* (Sup. Ct. Tenn., Sept., 1882), 78 Tenn. (10 Lea) 77. This last mentioned case appears never to have been cited on this point by the court of any other state except when cited in *Sorchan* v. *Mayo*. The opinions in the Tennessee case and other Tennessee cases contain no discussion as to the reason for the rule which is applied, and cite no authority from other states. The primary point discussed is the liability of the receiver. When that is determined the court states, as though it were a self evident proposition, that if the receiver is liable the complainant is also liable. The reason obviously is not the fact that the complainant selected the receiver because it is stated as an elementary proposition that the party upon whose motion a receiver is appointed is liable, even though the other party consented to the appointment of a particular person as receiver. (78 Tennessee 86.)

When the Tennessee case was decided, there was in force a statute under which the court appointing a receiver might, if it saw fit, require of the complainant a bond conditioned for the faithful discharge of his duties by the receiver. (Chapter XLVII, Acts of Tenn. for 1833 and Williams Code of Tenn., 1934, Sec. 10.559). We suggest that the explanation of the language of the Tennessee courts is to be found in this statute under which it is probable that in the case before the court the complainant had given a bond conditioned for the faithful performance of the duties of the receiver, so that comment upon the reason for the liability of the complainant was unnecessary.

We submit, therefore, that the Circuit Court of Appeals was clearly right in its conclusion that *Sorchan* v. *Mayo* and the Tennessee cases are at variance with the great weight of American authorities, and would not be re-

garded as even persuasive authorities by the court of North Carolina.

In discussing the question of insurance, counsel for petitioners appear to overlook the established rule referred to by the Circuit Court of Appeals that neither the mortgagee nor mortgagor is under any duty to effect insurance on mortgage property. It is well settled in North Carolina that each has an insurable interest. *Jeffreys* v. *Boston Insurance Co.* (Sup. Ct. of N. C. 3-9-32), 202 N. C. 368, 162 S. E. 761. The institution of a suit for foreclosure or even a sale not confirmed does not terminate the insurable interest of the mortgagor (C. J.—Fire Insurance—Sections 9 and 10, Vol. 26, pp. 28, 29, American Jurisprudence—Section 339-340, Vol. 29, pp. 303-4. The complaint offered no explanation as to why Robert L. Steele, III, failed to effect insurance for his own benefit, if indeed he wished insurance. Counsel for petitioners rely on *Thompson* v. *Phenix Insurance Co.* (Sup. Ct. U. S., 5-19-90), 136 U. S. 287, 34 L. Ed. 408, 10 S. Ct. 1019, as holding that a receiver is always bound to effect insurance on property in his possession. This court did not so hold. In fact it intimated that the contrary was true. The main question before the court was whether or not a receiver could, in the absence of prior authority from the court, effect insurance on property in his possession. The court did not go so far as to pass upon this point but actually held no more than that an insurance company who had written the policy and accepted the premium could not question the authority of the receiver, since the court could at least ratify the act. The only statement with respect to the duty of the receiver is the following statement (136 U. S. 293), "We do not doubt that under some circumstances a receiver would be derelict in his duty if he did not cause property in his hands to be insured against fire." We suggest that the circumstances which the court had in mind are those in which by reason of the multiplicity of the parties in interest, it is impractical for each interested party to protect himself and not cases in which, like the case at bar, each interested party

can readily effect insurance to the extent of his own interest. However, even if we concede, for the purposes of this argument only, that the receiver could, or perhaps should, have effected insurance, the matter was a legitimate one for discussion between the receiver and interested parties. Any party might properly express his wishes to the receiver, who was the "hand" of the court. If the request was ignored his remedy was an application to the judge, who was the head of the court. There is no allegation that Robert L. Steele, III, ever made known his wishes on the subject, either to the receiver or the court.

In conclusion, we submit that the weakness of the case of the plaintiff lies in the inaction of his decedent, Robert L. Steele, III. A receiver under the law of North Carolina is appointed in order that all interested parties may have equal opportunity to be heard as to the custody, management and disposition of the property under the control of the court. Each party may ask for such action as he deems proper. No party has power to do more. Robert L. Steele, III, had the same right and opportunity as the mortgagees to be heard as to the person to be appointed as receiver, the amount of the bond to be required, and the instructions to be given with respect to insurance, or otherwise. For reasons sufficient to himself, he remained inactive, and so his administrator cannot complain of acts in which the decedent acquiesced.

Respectfully submitted,

M. G. WALLACE,
Federal Reserve Bank of Richmond,
Richmond 13, Virginia,
R. H. DYE,
First and Citizens Bank Building,
Fayetteville, North Carolina,
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES

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No. 177

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA, AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, ex rel. and for the use and benefit of J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, Petitioners,

v.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, Respondents.

PETITION FOR REHEARING

WHITFORD S. BLAKENEY,
Charlotte, N. C.,
GEORGE S. STEELE,
Bockingham, N. C.,
Counsel for Petitioners.

Of Counsel:
GUTHERIE, PERSON & BLAKENEY,
Charlotte, N. C.

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v.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, Respondents.

PETITION FOR REHEARING

Reason Assigned for Rehearing

The petitioners respectfully request the Court to grant a rehearing in this cause and grant the petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. The reason assigned for rehearing is that the Circuit Court of Appeals failed to follow the applicable decisions rendered by the Supreme Court of North Carolina in the cases of *Dillon* v. *Winston-Salem* (1942), 221 N. C. 512, 20 S.E. 2d 845, and *Williams* v. *Blue* (1917), 173 N. C. 452, 92 S. E. 270.[1]

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[1] Though this is not a diversity of citizenship case (see p. 11 of Petitioners' Reply Brief), it was conceded that the law of North Carolina controlled this question. (R. 20, 142 F. 2d at 149.)

The Decision of the Supreme Court of North Carolina in Dillon v. Winston-Salem

In the *Dillon Case,* the Supreme Court of North Carolina held that, for the purpose of tort liability, he who controls a second person is liable under the doctrine of *respondeat superior* to any third person who is injured by the negligence of the second person. And this was held to be true even though no contract of employment existed between the first and second persons.

The plaintiff in the *Dillon Case* was the administratrix of Henry Lee Dillon, who had been killed on December 22, 1940, when he was nineteen years of age. 221 N. C. at 513, 20 S.E. 2d at 845. The action was brought for the wrongful death of Henry Lee Dillon. Dillon had been traveling in an automobile operated by Charles W. Cranford, who was fourteen years of age. 221 N. C. at 513, 20 S.E. 2d at 845. Dillon was directing Cranford where to drive the automobile and Cranford was driving it to the place he was directed by Dillon, though the two boys had never known each other before that night. 221 N. C. at 515, 20 S.E. 2d at 846-847. There was no evidence that Dillon told Cranford to drive in a negligent manner. The Court held that Cranford was guilty of negligence as a matter of law, and the Court further held that the negligence of Cranford was imputable to Dillon because Dillon was controlling Cranford's operation of the motor vehicle. The Court thereupon held that Dillon was guilty of contributory negligence and denied the plaintiff any recovery.

The Decision of the Supreme Court of North Carolina in Williams v. Blue

In *Williams* v. *Blue,* 173 N. C. 452, 92 S.E. 270, suit was brought by the plaintiff against John Blue, the owner of the automobile, Halbert Blue, the driver of the automobile, and Fannie A. Blue and J. W. Graham, passengers in the automobile. It was alleged in the complaint that the accident in which plaintiff was injured was caused by the negligence of Halbert Blue. Halbert Blue was acting as chauffeur for Fannie A. Blue and was acting

under the direction of J. W. Graham. There was no allegation that either Fannie A. Blue or J. W. Graham directed Halbert Blue to drive in a negligent manner or directed him to do any act which would be a negligent act. The defendants Fannie A. Blue and J. W. Graham demurred to the complaint on the ground that it failed to state a cause of action against them, and the trial court sustained the demurrer. On appeal to the Supreme Court of North Carolina, the Supreme Court reversed the trial court and ordered the defendants to answer over. 173 N. C. at 454, 92 S. E. at 270.

The Court said (173 N. C. at 453-454, 92 S.E. at 270):

"Ownership of an automobile is not essential to charge one with responsibility for its operation. . . . One in charge of operation of a motor vehicle, although he is neither the owner nor the person actually operating it, is nevertheless liable for injury sustained by third persons by reason of its negligent operation, *as the person actually operating the vehicle will be deemed his servant irrespective of whether he employed him or not.* 28 Cyc., p. 40." (Emphasis supplied.) This language was quoted with approval in *Dillon* v. *Winston-Salem, supra.*

The Application of the Decisions of Williams v. Blue and Dillon v. Winston-Salem to This Case

In this case, the record shows that the defendant McQueen was acting according "to the desires and directions of the defendants Farmers Bank & Trust Company and Federal Reserve Bank of Richmond . . ." (R. 3). Thus we have here the same situation with which the Supreme Court of North Carolina dealt in the *Dillon Case* and the *Williams Case.* And in each of those cases, the Supreme Court of North Carolina held that the person who directed another was liable for that other's negligence.

That the Circuit Court of Appeals failed to follow the decision in *Dillon* v. *Winston-Salem, supra,* apparently is practically conceded by respondents, for in their brief in opposition to the petition for certiorari they made no attempt to distinguish that case from this one, though it was relied upon in the petition.

In the *Williams Case,* as in this case (R. 9), there was an attack on the complaint for failure to state a cause of action. In the *Williams Case,* the Supreme Court of North Carolina held that those directing the second person were liable for his negligence, while in this case the Circuit Court of Appeals held that respondents, who were alleged to have been directing the receiver, were not liable for his negligence.

Conclusion

It is respectfully submitted that for the foregoing reasons this petition for rehearing should be granted, the petition for writ of certiorari should be granted, and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

WHITFORD S. BLAKENEY,
GEORGE S. STEELE,
Counsel for Petitioners.

Certificate of Counsel

Counsel for petitioners respectfully certify that this petition for rehearing is filed in good faith and is not presented for delay.

WHITEFORD S. BLAKENEY,
GEORGE S. STEELE,
Counsel for Petitioners.

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v.

FARMERS BANK AND TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, Respondents.

MOTION FOR LEAVE TO FILE MOTION TO VACATE ORDER OF OCTOBER 9, 1944.

The petitioners respectfully show unto the Court:

1. That the decision of the Circuit Court of Appeals for the Fourth Circuit was rendered on April 11, 1944, and that the petition for certiorari was filed in this Court on June 17, 1944. (R. 16.)

2. That, at the time the briefs in this case were filed in the Circuit Court of Appeals and the case was argued there, petitioners' counsel were not cognizant of the decisions of the Supreme Court of North Carolina in the cases of *Williams* v. *Blue*, 173 N. C. 452, 92 S. E. 270, and *Dillon* v. *Winston-Salem*, 221 N. C. 512, 20 S. E. 2d

845; that, consequently, petitioners did not cite those cases to the Circuit Court of Appeals, nor did they cite any other North Carolina cases of similar import, and the Circuit Court of Appeals failed to consider these cases.

3. That petitioners' counsel did not discover the cases referred to in paragraph 2 hereof until June 15, 1944; that, on said date, the thirty days allowed for the losing party to petition for rehearing in the Circuit Court of Appeals for the Fourth Circuit under Rule 19 of said Court had expired.

WHEREFORE, petitioners pray the Court that they be allowed to file herein a motion to vacate the order of October 9, 1944 to the end that certiorari may be granted, the judgment of the Court below vacated and the cause remanded to the Circuit Court of Appeals for the Fourth Circuit, for the consideration by that Court of the application of the cases referred to in paragraph 2 hereof.

WHITEFORD S. BLAKENEY,
GEORGE S. STEELE,
Counsel for Petitioners.

NORTH CAROLINA
RICHMOND COUNTY

George S. Steele, being first duly sworn, deposes and says that he has read the foregoing and annexed motion for leave to file a motion to vacate the order of October 9, 1944, and knows the contents thereof; that the same is true of his own knowledge; that this verification is made by him instead of by one of the petitioners because the matters stated therein are within his personal knowledge and are not within the personal knowledge of any of the petitioners.

GEORGE S. STEELE.

Sworn to and subscribed before me, Thomas L. Covington, Clerk of the Superior Court of Richmond County, North Carolina, which is a court of record, having a seal which is hereto attached, and is the court of general jurisdiction of Richmond County, North Carolina, this the eleventh day of May, 1945.

(L.S.) THOMAS L. COVINGTON.

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v.

FARMERS BANK AND TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION, Respondents.

MOTION TO VACATE ORDER OF OCTOBER 9, 1944[1]

From the verified motion for leave to file this motion, it appears that the Circuit Court of Appeals for the Fourth Circuit failed to consider the cases of *Dillon* v. *Winston-Salem*, 221 N. C. 512, 20 S. E. 2d 845, and

[1] This is not a petition for rehearing as a petition for rehearing invites a reconsideration on the original record. *Atchison, Topeka and Sante Fe R. Co.* v. *United States*, 284 U. S. 248, 259.

Williams v. *Blue*, 173 N. C. 452, 92 S. E. 270, because of the failure of petitioners' counsel to discover them and cite them to that court.

As appears from the first petition for rehearing filed by petitioners herein, these cases are controlling as far as this case is concerned, for they hold that he who controls another is liable for the other's torts, regardless of whether or not the principal-agent or master-servant relationship exists between the two. Thus, it seems almost certain that if petitioners' counsel had relied upon these cases in the Circuit Court of Appeals, that court would have reversed the order of the district court instead of affirming it.

In the instant case petitioners alleged in their complaint that the late Robert L. Steele, III, was damaged by the negligence of J. R. McQueen, a receiver of the said Steele's property appointed by the Superior Court of Bladen County, North Carolina. (R., 4 and 5.) Petitioners also alleged that while the said McQueen was acting as receiver he was acting under the direction and control of respondents. (R., 3.) On motion, the district court dismissed the action as to the respondents on the ground that such allegations did not constitute a cause of action against respondents. (R., 10 and 11.) The Circuit Court of Appeals affirmed the decision. (R., 16-23.)

If, as the decisions of the Supreme Court of North Carolina in the cases of *Dillon* v. *Winston-Salem* and *Williams* v. *Blue* hold, he who controls a third person is liable for his torts, then, obviously under the facts alleged in this case respondents are liable to petitioners for the negligence of the receiver. But we do not ask this court to decide this question of law. We merely ask this court to vacate the judgment of the court below and remand this case to the Circuit Court of Appeals in order that it may decide the question.

While it is well understood that this court cannot grant certiorari in every case in which it disagrees with the decision of the court below, and it is generally understood by the bar of this court that this court has time only to review those cases which are of national importance, still in the interests of justice, this court can, without the expenditure of a great deal of time, grant certiorari in this case, vacate the judgment of the Circuit Court of Appeals for the Fourth Circuit, and remand this cause to that court in order that it may consider the applicable North Carolina decisions.

It could work no hardship on respondents if this court should grant this motion, for if the Circuit Court of Appeals should decide that the decisions of the Supreme Court of North Carolina in the cases of *Dillon* v. *Winston-Salem* and *Williams* v. *Blue* are not controlling in this case, then the judgment of the district court would again be affirmed.

On the other hand, if this court should deny this motion, it would mean that petitioners are without remedy to have a hearing on the merits at which the cases of *Dillon* v. *Winston-Salem* and *Williams* v. *Blue* are considered.

WHEREFORE, petitioners pray the Court that the order of October 9, 1944 be vacated, certiorari be granted, the judgment of the Circuit Court of Appeals be vacated, and that the case be remanded to the Circuit Court of Appeals in order that that court may consider the North Carolina decisions of *Dillon* v. *Winston-Salem* and *Williams* v. *Blue*.

WHITEFORD S. BLAKENEY,
GEORGE S. STEELE,
Counsel for Petitioners.

(14)

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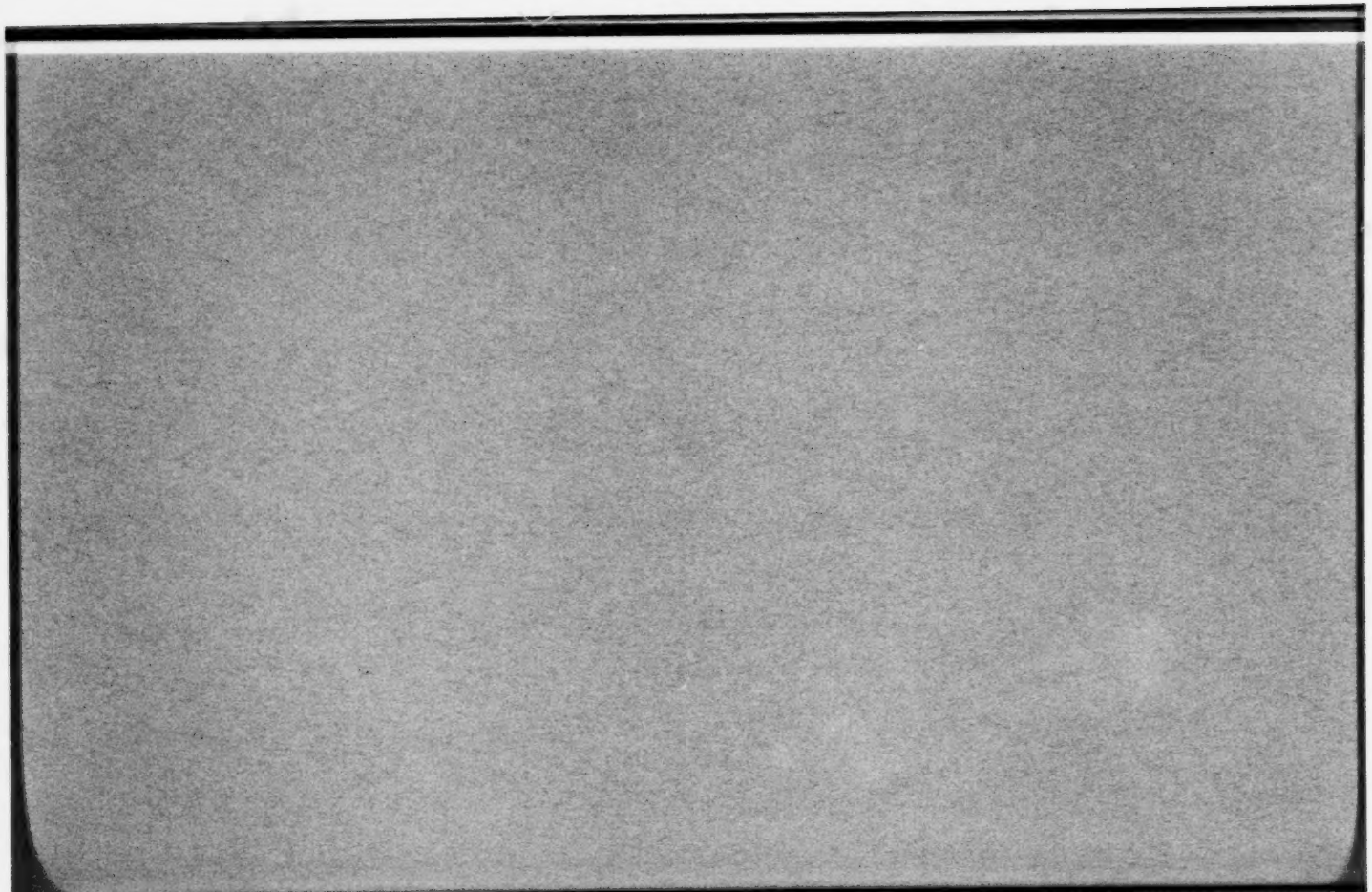
Petitioners,

v.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION,

Respondents.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING



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Petitioners,

v.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION,

Respondents.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

Prayer

Petitioners respectfully move the Court that they be allowed to file herein a second petition for rehearing.

Reason Relied On for Motion

It is understandable that this Court will refuse certiorari, nothing more being shown than that the lower court has failed to follow applicable local decisions, because that is mere error of law. And mere error of law is not sufficient to

induce this Court to grant a petition for certiorari, however costly to litigants it may be.[1]

Upon the matter here involved, however, the petitioners show more—namely, a conflict of decisions between the Fourth and the Sixth Circuit Courts of Appeals.[2] In such situations, certiorari ordinarily will be granted, for this Court has said: "* * * jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to this Court in order 'to secure uniformity of decision.' * * *."[3]

It must be, therefore, that this Court has denied petitioners' application for certiorari only because this Court considered that the question in conflict is moot in the instant case.

Petitioners earnestly represent to the Court that the question here in conflict is not moot and, for the purpose of so demonstrating, pray that they be allowed to file a second petition for rehearing, the second petition for rehearing being annexed hereto.

WHITEFORD S. BLAKENEY,
GEORGE S. STEELE,
Counsel for Petitioners.

1 *Skidmore* v. *Swift & Company*, certiorari denied, 320 U. S. 763, rehearing denied, 320 U. S. 812, reversed, 323 U. S. ——, 65 S. Ct. 161.

2 See cases cited *post*, p. 3.

3 *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 206.

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Petitioners,

v.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION,

Respondents.

SECOND PETITION FOR REHEARING

Statement of Matter Involved

In its opinion the Court below stated that if plaintiffs' motion for leave to amend comes under Rules 15(a) or 60(b), there was no abuse of discretion by the district court in refusing to allow plaintiffs to amend (R. 19, 142 F. 2d 147, 149). However, the district court bottomed its refusal to allow plaintiffs to amend on the failure of plaintiffs to allege anything additional in the proposed amendment on which planitiffs would be entitled to recover, and on the failure of the plaintiffs to make the motion within ten days (R. 13).

The denial of the motion was, therefore, made as a matter of law even though it was a matter in the discretion of the judge. It is here the conflict lies, for the Circuit Court of Appeals for the Fourth Circuit refused to review the ruling of the district judge because it was a matter that lies in his discretion, whereas the Circuit Court of Appeals for the Sixth Circuit in *Felton* v. *Spiro*, 78 F. 576, 24 C. C. A. 321, *Hernan* v. *American Bridge Company*, 167 F. 930, and *City of Corington* v. *Cincinnati N. & C. Railway Co.*, 71 F. 2d 117, held that where a district judge denies a motion on the ground that he has no discretion or fails to exercise his discretion, the ruling is reviewable.

The Question In Conflict Is Moot If the Proposed Amendment Do Not State a Valid Claim

However, the Court below in its opinion also stated that the proposed amendment does not state a valid claim (R. 19, 142 F. 2d 147, 149). Of course, if the Circuit Court of Appeals for the Fourth Circuit be correct in its holding that the proposed amendment does not state a valid claim, the question of whether or not the ruling of the district judge is reviewable is a moot one.

The Proposed Amendment Does State a Valid Claim

The proposed amendment alleged that the receiver failed to take insurance as the proximate result of instructions given him by the mortgagees (R. 11-12). It is well to bear in mind that the petitioners in the proposed amendment alleged that the mortgagees "instructed" the receiver not to obtain fire insurance until they advised him with what company to take it (R. 12). The word petitioners used was "instructed" instead of "advised" as the Circuit Court of Appeals stated (R. 19).

In *Donovan* v. *Laing, etc., Construction Syndicate* (1893), 1 Q. B. (Eng.) 629, *Lord Justice Bowen* said, "* * * If the

hirer [of a coach] actively interferes with the driving, and injury occurs to anyone, the hirer may be liable, not as a master, but as a procurer and cause of the wrongful act complained of." This language was quoted with approval by *Circuit Judge Taft* in *Byrne* v. *Kansas City, etc., R. Co.*, 61 Fed. 605, 610, 22 U. S. App. 220, 9 C. C. A. 666, 24 L. R. A. 693, 698, and in *Frerker* v. *Nickolson*, 41 Colo. 12, 92 P. 224, 14 Ann. Cas. 730, 731, 13 L. R. A. (N. S.) 1122, 1126. To like effect are *Burgess Brothers Company* v. *Stewart*, 112 Misc. 347, 184 N. Y. S. 199, affirmed, 194 App. Div. 913, 185 N. Y. S. 85, and *Adams* v. *Cook*, 91 Vt. 281, 100 A. 42. Counsel for petitioners have found no authorities contrary to this, and it is significant that the Court below cited none.

There would seem to be no conflict between the general law and the law of North Carolina on this point. As a matter of fact, the North Carolina cases go even further and hold that it is not necessary that the person be injured by the specific directions of the person interfering, but merely that he actually undertake general directions. *Dillon* v. *Winston-Salem*, 221 N. C. 512, 20 S.E. 2d 845; *Williams* v. *Blue*, 173 N. C. 452, 92 S.E. 270.

The Question In Conflict Is Moot If the Amendment Be Controlled by Rule 59(b)

If the district court properly denied petitioners' motion to amend because the motion was controlled by Rule 59(b), then the question in conflict between the Fourth Circuit Court of Appeals and the Sixth Circuit Court of Appeals is moot in the instant case, for the order of the district court was then properly affirmed on that ground.

Rule 59(b) provides that a motion for a new trial shall be served not later than ten days after the entry of the judgment. Of course, if a motion to amend a pleading after the action is dismissed for failure to state a claim on which relief can be granted be a motion for a new trial, then petitioners' motion was properly denied by the district court, and the question in conflict is moot.

The Motion to Amend Is Not Controlled by Rule 59(b)

However, a motion to amend in such circumstances is *not* a motion for a new trial.

It is well settled that, in construing an act, the court will adopt the definition of words that prevailed before the passage of the act. In *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115, 84 L. ed. 110, 60 S. Ct. 1, *rehearing denied*, 308 U. S. 637, 84 L. ed. 529, 60 S. Ct. 258, this Court said: "* * * we adhere to the familiar rule that where words are employed in an act which had at the time a well-known meaning in the law, they are used in that sense unless the context requires the contrary."

A "new trial" has universally been defined as a new trial of an issue of fact. 39 *Am. Jur.* 33, New Trial, Sec. 2; *Wheeling & Lake Erie Ry. Co.* v. *Ritcher*, 131 Ohio St. 433, 3 N.E. 2d 408, 410; *Garden City Feeder Co.* v. *Commissioner of Internal Revenue* (8th C. C. A.), 75 F. 2d 804. In *Anderson* v. *Independent Order of Foresters*, 98 N. J. L. 648, 126 A. 631, 632, it was held that the action of the circuit court in vacating a default judgment is not the granting of a new trial within the meaning of the statute requiring applications for new trials to be made within thirty days after entry of the judgment. And *Associate Justice Miller* in a dissenting opinion in *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. 19, 136 F. 2d 771, 776, ff., 148 A. L. R. 782, 787 ff., collects and comments upon numerous other authorities to the effect that a new trial is a new trial of an issue or issues of fact.

Thus, a motion for a new trial under Rule 59 is a motion for a new trial on an issue of fact; especially is this conclusion sustainable in view of the language of Rule 59(a): "Grounds. A new trial may be granted to all or any of the parties and *on all* or *part of the issues* (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions

at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States * * *." (Italics supplied.) The language "on all or part of the issues" implies that there shall have been a trial of issues of fact. And, as there had been no trial of fact in this case, the motion to amend comes more nearly within the classification of a motion to set aside or vacate a judgment. And, indeed, the Circuit Court of Appeals for the First Circuit, without deciding the question, stated that the plaintiff might move to amend under Rule 60 at any time within six months of a dismissal. *United States* v. *Newbury Manufacturing Company*, 123 F. 2d 453, 454-455.

The motion in this case could not even be a motion for a rehearing in the sense in which rehearing is used in appellate courts[4], for this Court has defined rehearing as follows:

"Ordinarily, a petition for rehearing is for the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites a reconsideration upon the record upon which that decision rested." *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 284 U. S. 248, 259, 52 S. Ct. 146, 149, 76 L. ed. 273.

Thus it is apparent that the motion for leave to amend could not have properly been denied on the ground that it was not served within ten days, and for that reason the question in conflict is not moot.

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[4] Under Equity Rule 69, rehearings were granted "only upon such grounds as would authorize a new trial in an action at law." *Sheeler* v. *Alexander*, 211 Fed. 544, 547, quoted with approval in *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. 19, 136 F. 2d, 771, 773, 148, A. L. R. 782, 784. Equity Rule 72 provided for correction of mistakes "without the form or *expense of a rehearing*." Since a rehearing in the Equity sense is expensive, it must necessarily be a rehearing of an issue of fact. It would seem, too, that since the power of an appellate court to grant rehearing is not derived from any statute but is inherent in it as a court of justice, the district court would likewise have such power. Indeed, it would seem strange to require a litigant to go to the expense of taking an appeal instead of allowing the district court to correct its own error. See *Bucy* v. *Nevada Construction Co.*, 9th C. C. A., 125 F. 2d 213, 216-217, where it was held that Rule 60 did not deprive the district courts of the power to correct manifest errors.

If the Motion In This Case Be Controlled by Rule 59(b), Certirorari Should Be Granted to Settle the Conflict Between the Decision In This Case and the Decision of the Circuit Court of Appeals for the First Circuit.

If this Court should decide that the motion in this case is controlled by Rule 59(b), then certiorari should be granted to resolve the conflict between the decision in this case and the statement in *U. S.* v. *Newbury Manufacturing Co.*, 123 F. 2d 453. In that case the Circuit Court of Appeals for the First Circuit stated that a motion for leave to amend after the action is dismissed for failure to state a claim on which relief can be granted may be made at any time within six months of the dismissal. If in this case the decision of the Circuit Court of Appeals for the Fourth Circuit be sustainable on the ground that the motion must be made within ten days, a conflict is immediately apparent.

Conclusion

It is earnestly contended that a conflict exists between the decision of the Circuit Court of Appeals for the Fourth Circuit and the decisions of the Circuit Court of Appeals for the Sixth Circuit in the cases cited above, that the question in conflict is not a moot one, and that this Court should grant the petition for writ of certiorari in order to resolve this conflict.

Prayer

Petitioners respectfully pray that the Court grant this petition for rehearing and the writ of certiorari prayed for in the petition therefor.

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CERTIFICATE OF COUNSEL

Counsel for petitioners respectfully certify that this petition for rehearing is filed in good faith and is not presented for delay.

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